Supreme Court, U.S.
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No. 02 553

UNITED STATES SUPREME COURT

BRICKWOOD CONTRACTORS, INC.,

Petitioner,

v.

UNITED STATES.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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United States Court of Appeals,
Federal Circuit.

BRICKWOOD CONTRACTORS, INC., Plaintiff-Appellee,
v.
UNITED STATES, Defendant-Appellant.

No. 01-5121.

May 3, 2002.

Robert M. Moore, Moore & Lee, of McLean, VA, for plaintiff-appellee. With him on the brief was Kristen A. Bennett.

Michael E. Robinson, Attorney, Appellate Staff, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Stuart E. Schiffer, Acting Assistant Attorney General; and Michael Jay Singer, Attorney. Of counsel were David M. Cohen, Director, Commercial Litigation Branch; and Robert E. Kirschman, Jr., Attorney. Also of counsel was Richard G. Welsh, Attorney, Office of General Counsel, U.S. Department of the Navy, of Washington, DC.

Before CLEVENGER, RADER, and PROST, Circuit Judges.

PROST, Circuit Judge.

The principal issue in this case is the applicability of the Supreme Court's recent decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), to the fee-shifting provisions of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412. The United States Court of Federal Claims, in a decision dated June 29, 2001, held that Brickwood Contractors Inc.'s ("Brickwood") recovery of attorney fees under the EAJA is not barred by *Buckhannon*. Because we disagree with the Court of Federal Claims' conclusion that *Buckhannon* does not apply to the EAJA and its alternative theories that attorney fees in this case are permissible under *Buckhannon*, we reverse.

BACKGROUND

On February 9, 1999, the Department of the Navy ("Navy") issued an Invitation for Bids ("IFB") to repair elevated water storage tanks at the Naval Air Station, Patuxant River, Maryland. Thereafter, the Navy issued amendments to the solicitation adding Polychlorinated Biphenyl ("PCB") contamination testing to the base requirements and adding three options related to removing PCB contamination from the water storage tanks. Five bids (base bid plus options) were received and publicly opened on April 6, 1999, with Brickwood identified as the apparent lowest bidder. As a result of further testing, however, the Navy determined there was no evidence of PCB contamination and on May 5, 1999, announced that the bids on the options were no longer needed and would therefore be excluded from the final price evaluation. Because of this change, Brickwood no longer had the lowest bid.

On June 15, 1999, the Navy further amended the solicitation, converting it from an IFB, or a solicitation of bids, to a Request for Proposals ("RFP"), or a negotiated procurement, deleting the Evaluation of Options and eliminating the requirements regarding PCBs. The Navy intended to negotiate with the bidders whose bids did not include the now determined unnecessary PCB testing.

On June 18, 1999, Brickwood filed a bid protest in the Court of Federal Claims seeking to enjoin the Navy from converting the IFB to an RFP and to direct the Navy to award the contract to Brickwood. A hearing was held on Brickwood's request for a temporary restraining order ("TRO") on June 21, 1999. On July 16, 1999, prior to any court decision on that TRO request, the Navy filed a Motion to Dismiss informing the court that "[a]fter further consideration of both the circumstances surrounding the solicitation and the governing FAR provisions, and in light of the Court's comments at the TRO hearing, the Navy has cancelled the solicitation and plans to re-solicit using a new IFB." The court dismissed Brickwood's protest on July 22, 1999, "without reaching the merits of the case."

Thereafter, on August 23, 1999, Brickwood filed an EAJA application seeking attorney fees and expenses for work performed on

the lawsuit protesting the Navy's attempted conversion to an RFP and on the EAJA application.

In its opinion dated April 9, 2001, the Court of Federal Claims found that Brickwood satisfied the requirements necessary for entitlement to attorney fees and expenses under the EAJA. [FN1] *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 148, 150 (2001) ("*Brickwood I*"). Applying the "catalyst theory" of "prevailing party" status pursuant to the EAJA, the court found that Brickwood was the "prevailing party" because it had succeeded on a significant issue in the litigation that resulted in a benefit to the plaintiff. In so doing, the court relied on what it termed the "advice" offered by the Supreme Court in *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 564 (1987), a case interpreting the "prevailing party" requirement with respect to attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. That "advice" was:

> FN1. The Court of Federal Claims recognized in *Brickwood I* that "[t]he Supreme Court [had] granted certiorari in a case in which the viability of the catalyst theory is directly at issue." 49 Fed.Cl. at 154 n.4.

> A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. Id. At 760-61, 107 S.Ct. 2672.

Notably, in applying *Hewitt's* interpretation of the term "prevailing party" in 42 U.S.C. §1988 to the same term in the EAJA, the court observed that "this construction of prevailing party is consistent with the policy behind EAJA, to compensate parties who cause the government to conform to the law." *Brickwood I* 49 Fed. Cl. at 154-55. The court further found that the government's position in litigation (and its underlying conduct regarding the procurement) was not substantially justified, and that there were no special circumstances that would make

the award of fees unjust. Id. at 163. Final judgment was issued on May 1, 2001, awarding plaintiff $10,939.00 in attorney fees and expenses.

On May 29, 2001, the Supreme Court issued its opinion in *Buckhannon* denying the plaintiff's fee claim under the Fair Housing Amendments Act of 1988, 42 U.S.C. §3613(c)(2)("FHAA") and the Americans with Disabilities Act of 1990, 42 U.S.C. §12205 ("ADA"). In so doing, the Court rejected the "catalyst theory" as a basis for attorney fee awards under fee shifting statutes because it allows a fee award "where there is no judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605, 121 S.Ct. 1835.

On June 8, 2001, the government filed a motion for relief from the court's prior judgment awarding attorney fees to Brickwood pursuant to Rule 60(b) of the Rules of the United States Court of Federal Claims, arguing that the Supreme Court's decision invalidated the basis of that judgment. The court concluded, however, that *Buckhannon* did not bar recovery by Brickwood and thus denied the government's motion. [FN2] First, the court held that *Buckhannon* does not apply to the determination of "prevailing party" under the EAJA, stating broadly that "[t]he standards for meeting the 'prevailing party' requirement recently set forth in *Buckhannon* conflict with the plain language and the legislative history of the EAJA." *Buckhannon II*, 49 Fed. Cl. at 745 n.5. The court based its conclusion on the fact that while *Buckhannon* applied to two specific statutes (the FHAA and the ADA) and referenced three others, the EAJA was not mentioned. Further, the court contrasted the EAJA and the five cited fee-shifting statutes, noting that the former stated that an award "*shall* be made unless the court finds that the position of the United States was *substantially justified*," whereas the latter allowed broad discretion to trial courts by use of the term "may" without any further "substantial justification" requirement. Id. at 746-47 (emphases added). The court concluded that these distinctions were significant in the context of construing the term "prevailing party": "Because the 'substantially justified' analysis directs the court to consider the merits of the case underlying the EAJA application, a plaintiff cannot prove the legal merits of the case solely through the 'prevailing party' requirement." Id. at 747. Thus, based on this analysis, the court concluded that the term "prevailing party," as it appears in the EAJA, means something different from that same term in other fee-shifting statutes. *Id.*

FN 2. The court acknowledged that although judgment had been entered in *Brickwood I*, the Supreme Court's decision, if applicable, provides authoritative law and must be given full retroactive effect in all cases still open on direct review, regardless of whether such events predate or postdate announcement of the rule. *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 738, 741 (2001) ("*Brickwood II*") (quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993).).

Second, the court concluded that the facts in *Brickwood II* were materially distinguishable from those in *Buckhannon* since the latter involved a change by the legislature in eliminating the requirements at issue in the litigation. Thus, in *Buckhannon* neither the Court nor the plaintiffs had a direct role in the action that engendered resolution of the case. Id. at 744.

Finally, the court held, in the alternative, that Brickwood is a "prevailing party" even if *Buckhannon* applies by virtue of the comments made by the court at the June 21, 1999, TRO hearing. Id. at 747-749. According to the court, although it did not issue a written opinion, at the TRO hearing it "announced its acknowledgement of the merits of plaintiff's claims, the rectitude of plaintiff's position, and the error of defendant's actions." Id. at 748. Those remarks, the court concluded, "amounted to a finding that the Navy had acted unlawfully ..." and "represent the necessary 'judicial imprimatur' that caused the change in the legal relationship of the parties." Id. at 749. In this regard, the court also expressed its "strong" opinion that "to interpret *Buckhannon* as requiring formal written judgments on the merits or formal findings of unlawful conduct will inhibit settlements and discourage parties from taking self-corrective action such as that taken by defendant in *Brickwood*." Id.

The United States filed a timely notice of appeal on July 2, 2001, from both the May 1, 2001, judgment and the June 29, 2001, order denying the Rule 60(b) motion. This court has jurisdiction pursuant to 28 U.S.C. 1295(a)(3).

DISCUSSION

This court reviews a trial court's decision to award fees and expenses under the EAJA for an abuse of discretion. *Geisler v. United States*, 232 F.3d 864, 869 (Fed. Cir. 2000). This court also reviews a trial court's ruling on a Rule 60(b)motion for abuse of discretion. *Info. Sys. & Networds Corp. v. United States*, 994 F.2d 792, 794 (Fed.Cir. 1993). We review the Court of Federal Claims' legal interpretation of the EAJA *de novo*. *Levernier Constr., Inc. v. United States*, 947 F.2d 497, 499 (Fed. Cir. 1991).

In *Buckhannon*, the Supreme Court rejected the use of the "catalyst theory" in construing whether one is a "prevailing party" under federal fee- shifting statutes such as the FHAA and the ADA. The "catalyst theory" grants prevailing party status to a plaintiff "if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 601, 121 S.Ct. 1835. The Court held that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." Id. at 604, 121 S.Ct. 1835 (citing Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866, (1989)). Both the majority and dissent in *Buckhannon* acknowledged that the "catalyst theory" had previously been recognized by the majority of Federal Courts of Appeals. *See* id. at 602, 121 S.Ct. 1835; *see also* id. at 625-26, 121 S.Ct. 1835 (Ginsburg, J., dissenting).

In *Buckhannon* the named plaintiff, an operator of assisted living homes, failed a state fire marshal's inspection because some of its residents were incapable of "self-preservation," i.e., removing themselves in such dangerous situations as fires. Id. at 600, 121 S.Ct. 1835. Plaintiffs sued the state seeking declaratory and injunctive relief and alleging that this self-preservation requirement violated the FHAA and the ADA. While the case was pending in District Court in West Virginia, that State's legislature enacted two bills that eliminated the "self-preservation requirement." The State's motion to dismiss the case as moot was granted by the District Court and the plaintiff then sought attorney fees as the "prevailing party" pursuant to the FHAA and the ADA, basing its entitlement on the "catalyst theory."

The Court in *Buckhannon* affirmed the Fourth Circuit's decision that the "catalyst theory," which allows a fee award where there is no judicially sanctioned change in the parties' legal relationship, lacks the necessary judicial imprimatur on the change to establish "prevailing party" status. Thus, the Court concluded it is not a permissible basis for the award of attorney fees under the FHAA and the ADA. According to the Court:

> Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party." The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court- ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold it does not.

Id. at 600, 121 S.Ct. 1835. Following the Supreme Court's decision in *Buckhannon*, the Court of Federal Claims rejected the government's argument that the Supreme Court's holding in *Buckhannon* compels a rejection of the award of attorney fees in I on three alternative grounds: (1) *Buckhannon* does not apply to attorney fees under the EAJA; (2) even assuming *Buckhannon* applies to the EAJA, its holding is limited to its facts—a purely voluntary change by the legislature not prompted by a lawsuit—and those facts are distinguishable from the facts in *Brickwood II;* and (3) even if *Buckhannon* applies to the EAJA and to the facts of this case, the court's statements at a prior TRO hearing met the requirements of *Buckhannon* We reject all of the Court of Federal Claims' alternative theories and discuss each in turn.

A

The Court of Federal Claims concluded that the Supreme Court's decision in Buckhannon rejecting the "catalyst theory" of the "prevailing party" requirement does not apply to the EAJA notwithstanding that the term "prevailing party," as construed by the Supreme Court in Buckhannon appears in virtually all fee-shifting statutes including the

EAJA. Instead, examining the text of the EAJA and its legislative history, the court concluded that the term "prevailing party" has a different meaning when used in the EAJA than when used in other fee-shifting statutes. We disagree.

As the Supreme Court observed in *Buckhannon* under the "American Rule, we follow 'a general practice of not awarding fees to a prevailing party absent explicit statutory authority.' " *Buckhannon*, 532 U.S. at 602, 121 S.Ct. 1835 (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994). In the numerous statutes in which Congress has provided for an exception to the "American Rule" by permitting certain designated parties an award of their litigation costs, Congress has used the term "prevailing party," a legal term of art. Id. at 603, 121 S.Ct. 1835.

Although two particular fee-shifting statutes, the FHAA and the ADA, were at issue in *Buckhannon*, the Court made it clear that its analysis applied to "the award of attorney's fees to the 'prevailing party' in numerous statutes in addition to those at issue here." 532 U.S. at 602, 121 S.Ct. 1835. Indeed, while *Buckhannon* specifically listed three fee-shifting statutes in addition to the FHAA and the ADA, the Court also expressly cited to the Appendix to Justice Brennan's dissenting opinion in *Marek v. Chesny*, 473 U.S. 1, 43-51,105 S.Ct. 3012, 87 L.Ed. 2d 1 (1985), , which lists over 100 federal fee-shifting statutes. In a footnote immediately following the reference to the *Marek* Appendix, the Court stated: "We have interpreted these fee shifting provisions consistently ... and so approach the nearly identical provisions at issue here." Id. at 603 n.4, 105 S.Ct. 3012 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7, 103 S.Ct. 1933 (1983). *Hensley*, which considered fees under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, held that the standards used to interpret the term "prevailing party" under any given fee- shifting statute "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Hensley*, 461 U.S. at 433 N.7, 103 S.Ct. 1933; *see also Schultz v. United States*, 918 F.2d 164, 166 N.2 (Fed Cir. 1990), 500 U.S. 906, 111 S.Ct. 1686, ("Indeed, the Supreme Court has recognized that the definition of 'prevailing party' does not differ from rule-to-rule or statute-to-statute.")

The Court of Federal Claims, however, differentiated between "prevailing party" under the EAJA and that same legal term of art found in numerous other fee-shifting statutes because the EAJA differs from other fee-shifting statutes in two other respects: (1) the EAJA mandates the award of fees if specified conditions are met by use of the word "shall," whereas such awards in other statutes are left to the court's discretion; and (2) in contrast to other statutes, the EAJA includes an additional hurdle for an award of attorney fees by only permitting an award if the government's position was not "substantially justified." [FN3] The court concluded that this substantial justification hurdle alleviates the concerns of the Supreme Court that motivated its elimination of the "catalyst theory" since it requires the court to review the merits of the case.

> FN3. To recover attorney fees under the EAJA, a person must be a "prevailing party." 28 U.S.C.§2412(d)(1)(A)(1994). That section provides that:
> Except as otherwise specifically provided by statute, a court *shall* award to a *prevailing party* other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than in cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust.
> *Id.* (emphases added).

The Appellant responds that the inclusion of the additional "substantial justification" requirement in the EAJA does not warrant an alternative interpretation of "prevailing party" under the EAJA. First, the Appellant points out that if an application for fees under the EAJA fails because the litigant is not a "prevailing party", the court never reaches the merits of the government's position in litigation. Also, the Appellant points out that the inclusion of the additional hurdle of "substantial justification" represents the fact that the bar under the EAJA

awards was intended to be higher than other fee shifting statutes, whereas the application of the "catalyst theory" to only the EAJA would have the opposite result. These are simply two separate and distinct hurdles one seeking such fees from the government must overcome.

We agree with the Appellant's construction of the statutory language. The Court of Federal Claims is obviously correct that there are certain differences between the EAJA and other fee-shifting statutes. The question, however, is not simply whether there are certain differences, but whether these differences would reasonably lead one to conclude that the "prevailing party" requirement in the EAJA should therefore be construed differently than in other statutes. Our examination of the text and the legislative history of the EAJA leads us to conclude that there is no basis for distinguishing the term "prevailing party" in the EAJA from other fee-shifting statutes. *See Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir.2002) ("we discern no reason to interpret the EAJA inconsistently with the Supreme Court's interpretation of 'prevailing party' in the FHAA and the ADA as explained in *Buckhannon.*") The unique aspects of the EAJA demonstrate that when Congress wanted the EAJA to operate in a certain way, it did so explicitly by adding certain criteria. In contrast, it chose to use the same term—"prevailing party"—in the EAJA as it appears in other fee-shifting statutes. As the Ninth Circuit has observed, explicitly disagreeing with the Court of Federal Claims decision in *Brickwood II*,

> [a]ll three statutes [the FHAA, the ADA, and the EAJA] use the identical term, "prevailing party." There is no reason to assume this term has a different meaning simply because under the EAJA a "prevailing party" "shall" be awarded reasonable attorney's fees absent substantial justification for the government's position, whereas under the FHAA and ADA the court "may" award fees. *Perez-Arellano*, 279 F.3d at 794 n.20; *see also Thayer v. Principi*, 15 Vet. App. 204, 211 (2001) ("the language of all of [the EAJA] as compared to the FHAA and ADA, coupled with the structure and content of the Supreme Court's opinion in Buckhannon, demonstrates that the definition of 'prevailing party' set

forth by the Supreme Court in Buckhannon applies to the appellant's EAJA application in this case.") As the Appellant also points out, the fact that the EAJA is mandatory and other fee shifting statutes are discretionary by no means warrants a different interpretation of the term "prevailing party." In fact, under certain statutes the term "may" has been construed in such a way that the scope of discretion is narrow. *See Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 129 (10th Cir.1980) (citing *Newman v. Piggie Part Enters., Inc.*, 390 U.S. 400 88 S.Ct. 964, 19 L.Ed2d 1263 (1968)).

Appellee Brickwood seeks further support for its position that the "catalyst theory" under the EAJA survives *Buckhannon* in the legislative history of the EAJA. Specifically, it cites to a statement in the Report by the Judiciary Committee that a party may be deemed a "prevailing party" if he obtains a favorable settlement of his case. H.R.Rep. No. 96-1418, at 11 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4990 (citing *Foster v. Boorstin*, 561 F.2d 340 (D.C. Cir. 1977)).

With respect to the legislative history, we note first the doubt expressed in *Buckhannon* regarding whether legislative history can overcome the rather clear meaning of "prevailing party," the term actually used in statute. *See Buckhannon*, 532 U.S. at 608, 121 S.Ct. 1835 ("Particularly in view of the 'American Rule' that attorneys fees will not be awarded absent 'explicit statutory authority,' such legislative history is clearly insufficient to alter the accepted meaning of the statutory term."). In any event, we disagree with Brickwood as to the import of the legislative history it cites. Indeed, to the extent it is arguably relevant to congressional intent regarding the construction of the term "prevailing party," it confirms our view that the term was intended to have the same meaning and interpretation in the EAJA as in other fee-shifting statutes. In fact, the statement relied on by Brickwood and cited above is preceded by the statement: "It is the committee's intention that the interpretation of the term ['prevailing party'] be consistent with the law that has developed under existing statutes." H.R.Rep. No. 96-1418, at 11 (1980), reprinted in 1980

U.S.C.C.A.N. 4984, 4990. Thus, what is probative about the comments found in the legislative history is not that Congress wished to apply the holding of one particular case dealing with another statute, but that it intended, overall, that the meaning and interpretation of "prevailing party" in the EAJA match and be consistent with its construction and interpretation in other federal fee-shifting statutes.

In sum, we reject the Court of Federal Claims' analysis that the text or the legislative history of the EAJA compels a reading or construction of the term "prevailing party" different from other federal fee-shifting statutes and thus conclude that the Supreme Court's construction of that term as not allowing for the "catalyst theory" applies with equal force and effect to the EAJA.

B

As previously noted, *Buckhannon* involved a suit against the state of West Virginia alleging that its effort to close assisted living residences pursuant to a "self preservation" requirement violated the FHAA and the ADA. After the state legislature acted to eliminate this statutory requirement and the case was dismissed as moot, Buckhannon moved for an award of attorney fees under the "catalyst theory." In part, the Court of Federal Claims reached its conclusion in *Brickwood II* by distinguishing its facts from those in *Buckhannon* In this regard the court stated:

> [I]t appears from the facts articulated by the Supreme Court in *Buckhannon* that neither the court nor the plaintiffs had a role in bringing about the resolution of the case.... Although according to the dissent in *Buckhannon*, the plaintiffs alleged that their lawsuit caused the statutory change, a direct causation is unlikely given the independence normally exercised by legislatures when enacting laws. Moreover, the lawsuit filed by the plaintiffs did not cause a change in the defendant's behavior.... Under these circumstances, a plaintiff should not be entitled to claim and receive attorney's fees under *any* fee-shifting provision.

49 Fed. Cl. at 744 (emphasis added). This statement by the court, read broadly, suggests a view that the plaintiff in *Buckhannon* might not even qualify as a prevailing party under the "catalyst theory" and thus the "catalyst theory" might be alive and well—even under FHAA and the ADA—if litigation rather than legislative action is found to cause a change. We reject such an analysis. In our view, the Supreme Court in *Buckhannon* unambiguously rejected the "catalyst theory" except in instances where there is an enforceable judgment on the merits or a court-ordered consent decree, both of which create a material alteration in the legal relationship of the parties. The Court's holding in *Buckhannon* leaves no room for a distinction to be drawn between whether a change is brought about by the legislature, as in *Buckhannon* or by the government's cancellation of the solicitation in this case.

C

Finally, the Court of Federal Claims held that "even if the *Buckhannon* standards were to be applied to recovery under the EAJA, the court's May 1, 2001 judgment need not be altered because the plaintiff Brickwood factually establishes itself as the 'prevailing party' by meeting the concerns described in *Buckhannon*" *Brickwood II*, 49 Fed. Cl. at 747. Specifically, the court referenced remarks it made at the TRO hearing at some length and concluded that "[i]n this exchange, the court, although it did not issue a written opinion, announced its acknowledgment of the merits of plaintiff's claim, the rectitude of plaintiff's position, and the error of defendant's actions." Id. at 748.

We disagree. As a preliminary matter, we note that the excerpt from the TRO hearing cited by the court is preceded by the following comment: "So, obviously, this is a bare-bones record and those are very conclusory and very preliminary thoughts, but it should be enough for you to work from, from this point forward." The court proceeded to set a schedule for further proceedings in this case. In any event, the Court of Federal Claims' conclusions regarding remarks at a TRO hearing miss the mark. In our view, the cited comments are clearly not sufficient to establish a judicial imprimatur and they do not constitute a "court-ordered change in the legal relationship" of the parties as

Buckhannon requires. All we have in this case are simply "very preliminary" remarks at a TRO hearing and no TRO ever issued. [FN4]

> FN4. Since a TRO was not issued in *Brickwood I*, we need not reach the question recently addressed by the Fourth Circuit of whether even the grant of a preliminary injunction is sufficient to achieve "prevailing party" status under *Buckhannon*. *See Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir.2002) ("The fact that a preliminary injunction is granted in a given circumstance ... by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of a preliminary injunction.")

The Court of Federal Claims concluded its analysis in this regard by observing that "[a]s a trial court, this court is of the strong opinion that to interpret *Buckhannon* as requiring formal written judgments on the merits or formal findings of unlawful conduct will inhibit settlements and discourage parties from taking self-corrective action such as that taken by the defendant in Brickwood." *Brickwood II*, 49 Fed. Cl. at 749. It is, of course, by no means clear why one would assume that the Navy in this case would be more likely to rescind its solicitation if it had to pay attorney fees than if it did not. What is clear is that there was neither a written nor an oral judgment in this case. More importantly, however, the Supreme Court in *Buckhannon* considered and rejected various policy arguments in favor of the "catalyst theory" and it is certainly not this court's role to insert our own policy views to reach a different result. As the Court held:

> Given the clear meaning of "prevailing party" in the fee-shifting statutes, we need not determine which way [the] various policy arguments cut. In *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), we said that Congress had not "extended any roving authority to the

> Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be a similar assumption of a "roving authority."

Buckhannon, 532 U.S. at 610, 121 S.Ct. 1835.

CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Federal Claims.

REVERSED.

United States Court of Federal Claims.

BRICKWOOD CONTRACTORS, INC., Plaintiff,

v.

UNITED STATES, Defendant.

No. 99-388C.

June 29, 2001.

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David D. Zimmerman, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., Robert E. Kirschman, Assistant Director and David M. Cohen, Director, United States Department of Justice, for the defendant.

ORDER

HORN, Judge.

The above-captioned case comes before the court on defendant's motion for relief from judgment pursuant to Rule 60(b) of the Rules of the United States Court of Federal Claims (RCFC). On April 9, 2001, the court issued a published decision in this case, finding the defendant liable to the plaintiff for attorneys' fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412 (1994 & Supp. IV 1998). *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 148 165 (2001) . In this opinion, the court ordered the parties to consult and to file a joint status report addressing the proper computation for the EAJA recovery. Id..Final judgment in this case was issued by this court on May 1, 2001, awarding the plaintiff a modest $10,939.09 in attorneys' fees and expenses. On June 8, 2001, the defendant filed a motion for relief from judgment arguing that a decision issued on May 29, 2001 by the *United States Supreme Court in Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,— U.S.—,121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), after judgment was

issued by this court in the above-captioned case, invalidates the basis of this court's May 1, 2001 judgment. The defendant also filed a motion for expedited consideration of its motion for relief from judgment because the defendant's time for appeal expires on July 2, 2001, and defendant represented that it may file a notice of appeal to the United States Court of Appeals for the Federal Circuit. Defendant argues that the filing of a notice of appeal would "deprive this Court of jurisdiction to allow our motion for reconsideration." Because the court is not inclined to grant defendant's motion, even if a notice of appeal were to be filed, this court could consider and issue an opinion on defendant's RCFC 60 (b) motion. *See Yachts Am., Inc v. United States*, 8 Cl Ct. 278, 281 (permitting the trial court to consider a 60(b) motion after an appeal has been filed if the court intends to deny the motion), *aff'd*, 779 F. 2d 656 (Fed. Cir. 1985), and *cert. denied*, 479 U.S. 832, 107 S Ct. 122, 93 L. Ed. 2d 68 (1986). The court, however, has expedited consideration of defendant's motion to provide a more complete record to the appellate court should the defendant decide to appeal this court's judgment.

FINDINGS OF FACT

The facts of this case were fully detailed in this court's April 9, 2001 opinion, *Brickwood Contactors, Inc. v. United States*, 49 Fed Cl. 148, and those facts are incorporated into this opinion. Only a brief recitation of the most pertinent facts to the present motion will be repeated here. On February 9, 1999, the Department of the Navy issued IFB (Invitation for Bids) No. N62477-97-B-0083, Repair Elevated Water Storage Tanks, Naval Air Station, Patuxent River, Maryland. The Navy subsequently issued amendments to the solicitation which added PCB (Polychlorinated Biphenyl) contamination testing to the base requirements and added three options related to removing the contamination from the water tanks. Amendment 0003 stated that "the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement." On April 6, 1999, five bids, including that of the plaintiff, were received and publicly opened. Based upon the total price (base bid plus options), the Navy identified plaintiff as the apparent low bidder.

Pursuant to Amendment 0004, the base specifications would have required the contractor to test for PCB contamination. In late

April 1999, however, the Navy conducted tests on the water towers to determine if the options would ever need to be exercised. On April 29, 1999, the Navy concluded that there was no evidence of PCB contamination. Therefore, on May 5, 1999, the Navy issued a Determination and Findings for Evaluating Bids Exclusive of Options, announcing that the bids on the options would be excluded from the final price evaluation because they were no longer needed. If the options had been evaluated along with the base bids, plaintiff would have had the low bid. Without the options, plaintiff would have been displaced in the evaluation by two other bidders who had lower base bids. On June 15, 1999, the Navy issued Amendment 0005 to the solicitation, which attempted to convert the solicitation from an IFB to a Request for Proposals (RFP), deleted the Evaluation of Options clause and eliminated the requirements regarding PCBs. Following the conversion to an RFP, the Navy intended to negotiate with the bidders for bids which did not include the cost of the unnecessary PCB testing.

On June 18, 1999, plaintiff filed a bid protest in the United States Court of Federal Claims alleging that "[t]he Navy's attempt to convert an IFB to an RFP, however, is not authorized by FAR or any other law or regulation." Plaintiff requested the court to enter judgment "enjoining the Navy from converting the IFB to an RFP," and "directing that the Navy proceed with the award of the contract to Brickwood." The court held a hearing on the bid protest on June 21, 1999. On July 16, 1999, after plaintiff filed its lawsuit, the defendant issued Amendment 0009, by which the government cancelled the solicitation (N62477-97-R-0083). Defendant filed a motion to dismiss in this court, informing the court that "in light of the Court's comments at the TRO hearing, the Navy has cancelled the solicitation and plans to re-solicit using a new IFB." Because the Navy cancelledthe solicitation at issue instead of converting from an IFB to an RFP, this court dismissed plaintiff's protest on July 22, 1999.

On August 23, 1999, plaintiff filed an EAJA application seeking attorneys' fees and expenses for work performed on the lawsuit protesting the Navy's attempted conversion to an RFP and on the EAJA application. Brickwood was ultimately awarded the Patuxent River Naval Air Station contract on January 10, 2000.

In this court's April 9, 2001 opinion, the court found that the plaintiff satisfied the requirements necessary for entitlement to attorney's fees and expenses under EAJA and that the defendant was liable to the plaintiff under EAJA. *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. at 165 Specifically, the court found that the plaintiff was the "prevailing party" in the June 18, 1999 bid protest because it had succeeded on a significant issue in the litigation which resulted in a benefit to the plaintiff. Id. at 156. In its opinion, the court discussed the definition of "prevailing party," including the "catalyst theory," which posits that a plaintiff may be considered a "prevailing party" for fee-shifting purposes without litigating to a final judgment if the plaintiff brings a lawsuit that is a " 'causal, necessary, or substantial factor in obtaining the result' plaintiff sought." Id. at 154 (quoting *Public Citizen Health Research Group v. Young*, 909 F. 2d. 546, 549 (D.C.Cir.1990)) (quoting Comm'rs Court of Medina County, Texas v. United States, 683 F. 2d 435, 442 (D.C. Cir.1982)

On June 8, 2001, the defendant filed a motion for relief from judgment, arguing that "[a]fter judgment was entered, but before the time to file a notice of appeal expired, the United States Supreme Court issued its decision in *Buckhannon Board and Care Home,Inc. v. West Virginia Department of Health and Human Resources*, —U.S.—,121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), invalidating the 'catalyst theory' as a basis for finding prevailing party status for federal attorney's fee statutes." The defendant asserts that because "intervening case law governs cases ***741** even after a trial court enters judgment" and because the facts in *Buckhannon* are indistinguishable from the facts in Brickwood this court entered a judgment that has become "erroneous as a matter of law." Thus, defendant argues that the court should find that Brickwood was not a prevailing party, and, therefore, relieve the defendant from the May 1, 2001 judgment pursuant to either RCFC 60 (b)(1) or RCFC 60 (b)(6).

DISCUSSION

In pertinent part, RCFC 60(b) states:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative

> from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; ... or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

RCFC 60(b). The United States Court of Appeals for the Federal Circuit has found that the act of balancing "all of the factors arising in a Rule 60 (b) motion is committed to the sound discretion of the [trial] court." *W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.*, 977 F. 2d 558, 562 (Fed. Cir.1992); *see Dynacs Eng'g Co.,Inc. v. United States*, 48 Fed.Cl. 240 241 (2000) ("The decision to grant relief under Rule 60(b)is addressed to the discretion of the court, and the court may weigh equitable considerations in the exercise of its discretion."). Although the court has entered judgment in this case, the decision of the United States Supreme Court, if applicable, provides authoritative law because "[w]hen [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Supreme Court's] announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). Because this court's May 1, 2001 judgment is still open on direct review, the Supreme Court's Buckhannon opinion may apply retroactively to the present case.

Federal courts have not agreed on whether a trial court may properly reopen or reconsider a judgment pursuant to RCFC 60(b) [FN1] because of an alleged mistake of law. For example, some courts have held that an allegedly erroneous legal finding cannot provide a basis for relief under Rule 60 (b). *See, e.g., McKnight v. United States Steel Corp.*, 726 F. 2d 333, 336 (7th Cir. 1984) ("Although it is apparent that the law of this circuit on which the district court relied in dismissing plaintiff's complaint ... has been overruled by *Zipes [v. Trans World Airlines, Inc.*,455 U.S. 385, 102 S.Ct. 1127, 71 L. Ed. 2d 234 (1982)], a change in the applicable law after entry of judgment does not, by

itself, justify relief under 60(b)." (citations omitted)); *Silk v. Sandoval*,435 F. 2d 1266,1267-68 (1st Cir.) ("If the court merely wrongly decides a point of law, that is not 'inadvertence, surprise, or excusable neglect' " within the meaning of Rule 60 (b)(1.), *cert. denied*, 402 U.S. 1012, 91 S. Ct. 2189, 29 L. Ed. 2d 435 *and reh' g denied*, 404 U.S. 876, 92 S Ct. 29, 30 L. Ed. 2d 123 (1971); *Berryhill v. United States*, 199 F. 2d 217, 219 (6th Cir. 1952) ("It appears to be the settled rule that a change in the judicial view of the applicable law, after a final judgment, is not a basis for vacating a judgment entered before announcement of the change."). One rationale for rejecting mistakes of law as a basis for 60(b) relief rests on the premise that "[t]he appropriate way to seek review of alleged legal errors is by timely appeal; a 60(b) motion is not a substitute for an appeal or a means to enlarge indirectly the time for appeal." *McKnight v. United States Steel Corp., 726 F.2d at 338 (citing Peacock v.Bd. of School Comm'rs*, 721 F. 2d 210, 214 (7th Cir. 1983) (additional citations omitted)).

> FN1. Although the cases discussed below include examination of Federal Rule of Civil Procedure (FRCP)60(b) in appeals from federal District Court cases, the United States Court of Appeals for the Federal Circuit has acknowledged that FRCP 60 (b) and RCFC 60 (b) are virtually identical. *See Info. Sys. and Networks Corp. v. United States*, 994 F. 2d 792, 795 n. 3 (Fed. Cir.1993). Moreover, the United States Court of Appeals for the Federal Circuit has referred to the interpretations of other Courts of Appeals regarding FRCP to 60 (b)assist in establishing standards for interpreting RCFC 60 (b) *See*
> Id 794-795.

Among the findings by courts that a change in the law does not justify Rule 60 (b) relief are those involving situations in which the judgment for which the party requests reconsideration has already become final and nonappealable. *See, e.g., W.L. Gore & Assocs.,Inc. v. C.R. Bard, Inc*, 977 F.2d at 560, 561, 563 (affirming denial of a request under 60(b) to modify a settlement agreement entered into "by the deliberate choice of the parties" because "[t]he consent order embodying

the settlement between Gore and Bard is a final judgment; it is accompanied by finality as stark as an adjudication after full trial" and because the court must give weight to the " 'overriding interest in the finality and repose of judgments' on consent"); *Mc Knight v. Unites States Steel Corp.*, 726 F. 2d at 338 ("By not filing a timely appeal from the order dismissing his case, plaintiff waived his right to have this court review errors of law made by the district court in that order. Such errors may not be used as a basis to obtain relief under 60(b)."); *Collins v. City of Withita*, Kansas, 254 F. 2d 837, 839 (10th Cir. 1958)*Collins v. City of Wichita, Kansas*, 254 F, 2d 837, 839 (10th Cir.1958) (finding that relief under Rule 60 (b) was unjustified when the appellants "exhausted their remedies in the courts, and when the litigation was concluded, there was a final judgment against them which, according to a later decision, was wrong"); *Berryhill v. United States*, 199 F. 2d at 219 (affirming denial of Rule 60 (b) relief when appellant freely elected against filing an appeal).

Other United States Courts of Appeals have found that, pursuant to a Rule 60 (b) motion, trial courts may review the impact of changes in the applicable law after a judgment is entered. *See, e.g., Ritter v. Smith*, 811 F. 2d 1398, 1401 (11th Cir.) ("The Eleventh Circuit has recognized that Rule 60 (b) can be used to remedy a mistake in the application of the law.... [Sometimes more than a 'mere' change in the law is necessary to provide the grounds for Rule 60 (b) (6) relief.... A significant factor in this case is the fact that the previous erroneous, judgment of this court has not been executed."), *reh'g denied*, 817 F. 2d 761 (11th Cir), *and cert. denied*, 483 U.S. 1010, 107 S. Ct. 3242, 97 L. Ed. 2d 747 (1987); *D.C Fed'n of Civics Assocs. V. Volpe*, 520 F. 2d 251, 453 (D.C. Cir 1975); *Oliver v. Home Indem. Co.*, 470 F. 2d 329, 330-31 (5th Cir. 1972) (adopting a construction of Rule 60 (b) which allows a " 'mistake' to encompass judicial mistake in applying the appropriate law" because of an alleged change in the law); *Schildhaus v. Moe*, 335 F. 2d 529, 531 (2nd Cir. 1964) ("[N]o good purpose is served by requiring the parties to appeal to a higher court, often requiring remand for further trial proceedings, when the trial court is equally able to correct its decision in the light of new authority on application made within the time period permitted for appeal").

Although there is a split in the circuits regarding whether a subsequent change in the law will provide a basis for Rule 60 (b) relief, courts have consistently found that a Rule 60 (b) motion filed before the time for filing a notice of appeal has expired may be considered by the trial court. See, e.g., D.C. Fed'n of Civic Assocs. V. Volpe, 520 F. 2d at 453 (permitting "intervening appellate decisions to be raised within the time for appeal by motion under Rule 60 (b) (1) "); Oliver v. Home Indem. Co., 470 F.2d at 330 (finding that "the district court properly entertained Pruitt's motion which was filed within the period allowed for giving notice of appeal and in fact after notice of appeal had been filed"); Schildhaus v. Moe, 335 F.2d at 531 (confirming a prior holding that a Rule 60 (b) motion may be considered when "[e]leven days after the entry of a defendant's judgment in that case, correct under the law laid down by this Court, the Supreme Court rendered a decision which showed the judgment to be erroneous" and "the plaintiff moved under Rule 60 (b) ten days thereafter, within the 30-day period allowed for appeal"). In interpreting Rule 60 (b), the Court of Appeals for the District of Columbia reasoned that "it is obviously sound administration for litigants to provide the District Courts with the opportunity to correct 'errors' of this sort, and to spare this court unnecessary appeals." *D.C Fed'n of Civic Assocs. V. Volpe*, 520 F. 2d at 453.

In the present case, this court entered judgment on May 1, 2001, and, therefore, the deadline for filing a notice of appeal to the United States Court of Appeals for the Federal Circuit is July 2, 2001.[FN2] The decision of the United States Supreme Court, *Buckhannon Board and Care, Home Inc. v. West Virginia* of Health and Human Resources,— U.S.—,121 S. Ct. 1835, 149 L Ed. 2d 855, which, according to the defendant, renders this court's May 1, 2001 judgment erroneous, was decided on May 29, 2001. Defendant filed its RCFC 60(b) motion for relief from judgment based on the Buckhannon opinion on June 8, 2001, within the time required for the filing of the notice of appeal from the May 1, 2001 judgment. Because the defendant's time for filing the notice of appeal has not expired, the court finds that it may properly consider an RCFC 60 (b) motion for relief from judgment based on intervening law that allegedly causes the court's prior judgment to become erroneous as a matter of law. It remains unclear whether an alleged mistake of law is properly reviewed under RCFC 60(b)(1) or

RCFC 60(b)(6) The choice between the two subsections, however, will not alter the result of this order because, in the opinion of this court, based on the facts presented, the later decision of the Supreme Court does not effect a change in the governing law which compels a reconsideration of this court's May 1, 2001 judgment.

> FN2. Rule 4 (a) (1) (b) of the Federal Rules of Appellate Procedure. The deadline for the filing of a notice of appeal in this case, stating that "[w]hen the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)

At first blush, the Buckhannon decision might appear difficult to distinguish from the case before this court. However, there are significant factual distinctions. This court believes that the facts presented to the Supreme Court did not provide the Court with an opportunity to address the more common scenarios presented to trial courts, especially in government contract cases, such as the one before this court. Moreover, although the Supreme Court framed the question before it broadly and offered a categorical answer, the text of Justice Rehnquist's opinion, in which Justices O'Connor, Scalia, Kennedy and Thomas joined, bolstered by Justice Scalia's concurring opinion, in which Justice Thomas joined, refined the standards for determining the application of the Buckhannon ruling by trial and lower appellate courts.

At the commencement of Justice Rehnquist's opinion, he wrote:

> Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party." The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court- ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

Id. at 1839. At the close of Justice Rehnquist's opinion, he also wrote: "For the reasons stated above, we hold that the 'catalyst theory'

is not a permissible basis for the award of attorney's fees under the FHAA [Federal Housing Amendments Act of 1988], 42 U.S.C.§ 3613 © (2) and ADA [Americans with Disabilities Act of 1990], 42 U.S.C. § 12205." *Buckhannon Bd. And Care Home, Inc. V. West Virginia Dept' of Health and Human Resources*, —U.S. at —, 121 S.Ct. at 1843.

In Buckhannon the named plaintiff, which operated assisted living care homes, failed a West Virginia state inspection for violating a state law because some of the residents were incapable of "self preservation," i.e., incapable of removing themselves from dangerous situations such as a fire. Id. At 1838. The plaintiffs brought suit in federal court alleging that the "self-preservation" requirement violated the Fair Housing Amendments Act of 1988 (FHAA), 102 Stat. 1619, 42 U.S.C.§ 3601 *et seq.*, and the Americans with Disabilities Act of 1990(ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq. Buckhannon Bd. And Care Home,Inc. v.West Virginia Dept' of health and Human Resources*,—U.S. at—,121 S. Ct. at 1838. While the case was pending in District Court, the West Virginia legislature enacted two bills which eliminated the "self-preservation" requirement. Id. The respondents moved to dismiss the case as moot, which the District Court granted. Id. The petitioners then requested attorney's fees as the "prevailing party" pursuant to the FHAA42 U.S.C. § 12101 *et seq. Buckhannon Bd. And Care Home,Inc. v.West Virginia Dept' of health and Human Resources*,—U.S.at—,121 S. Ct. at 1838.

The holding of the court in *Buckhannon* was specifically written to apply "under the FHAA, 42 U.S.C. § 3613 (c)(2) and ADA,42 U.S.C § 12205. *Buckhannon Bd. And Care Home, Inc. v. West Virginia Dept' of Health and Human Resources*,—U.S. at—121 S.Ct. at 1843. The Court also noted in dicta that the "prevailing party" provisions in certain other fee-shifting statutes should be interpreted consistently and listed the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C § 2000e-5(k), the Voting Rights Act Amendments of 1975, 89 Stat. 402, 42 U.S.C § 1973(e),and the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988. *Buckhannon Bd.and Care Home, Inc. v. West Virginia Dept' of health and Resources*,—U.S. at—,121 S.Ct. at 1839. The EAJA is not mentioned in the *Buckhannon* opinion.

Even more significant, it appears from the facts articulated by the Supreme Court in *Buckhannon* that neither the court nor the plaintiffs had a role in bringing about the resolution of the case. The West Virginia legislature, an entity not involved in the lawsuit, independently intervened to alter the relevant statutory language, which caused the case to become moot. The defendant appears not to have engaged in improper conduct, but was prepared to carry out its statutory obligations. Although according to the dissent in *Buckhannon* the plaintiffs alleged that their lawsuit caused the statutory change, a direct causation is unlikely given the independence normally exercised by legislatures when enacting laws. Moreover, the lawsuit filed by the plaintiffs did not cause a change in the defendant's behavior; the legislative revision allowed defendants to change their actions without violating state law. Under these circumstances, a plaintiff should not be entitled to claim and receive attorney's fees under any fee-shifting provision.

After reviewing the prior holdings of the Supreme Court and the plain language of the FHAA and the ADA, the *Buckhannon* court stated that a "prevailing party" must have prevailed pursuant to a "judicially sanctioned change in the legal relationship of the parties." Id. at 1840. The Court also wrote that a defendant's voluntary change in conduct "lacks the necessary judicial imprimatur on the change," but that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." Id. (citing *Texas State Teachers Assn. V. Garland Independent School Dist.*, 489 U.S. 782, 792-93,109 S. Ct. 1486, 103 L Ed.2d 670 (1980). In explaining its position, the Court's opinion also cited to language in *Hanrahan v. Hampton*, 446 U.S. 754,757,100 S Ct. 1987, 64 L Ed. 2d 670 (1980): " 'It seems clearly to have been the intent of Congress to permit ... an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the *trial court* or *on appeal.*' (emphasis added)" *Buckhannon Bd. And care Home, Inc. v. West Virginia Dept' of Health and Human Resources*, — U.S. at—,121 S. Ct. at 1840. [FN3] *Buckhannon Bd. And care Home, Inc. v. West Virginia Dept' of Health and Human Resources*, — U.S. at —, 121 S. Ct. at 1840. [FN3] The Court further noted that a decision relied on by the petitioners, *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8thCir.1970), was

actually consistent with the court's holding in Buckhannon because the Parham court concluded that the plaintiff's lawsuit acted as a catalyst only after finding that the defendant had acted unlawfully. *Buckhannon Bd. and care Home, Inc. v. West Virginia Dept' of Health and Human Resouces,*—U.S— at —n.9, 121 S.Ct. at 1842 n. 9.

> FN3 The Buckhannon court considered the legislative history of 42 U.S.C. §1988 and determined that even supportive legislative history alone, which was "at best ambiguous," could not provide the "explicit statutory authority" required to shift the responsibility for fees to the loser. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept' of Health and Human Resources*, —U.S. at—,121 S. Ct. at 1842 (citing *Key Tronic Corp. v. United States*, 511 U.S. 809,819,114 S.Ct. 1960, 128 L. Ed.2d 797 (1994).

Although the Buckhannon opinion provides guidance regarding the "prevailing party" requirement contained in certain statutes, this intervening decision does not resolve how to interpret the requirement under EAJA for awarding attorney's fees in the case before this court. The two statutes at issue in Buckhannon were the FHAA, 42 U.S.C. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept' of Health and Human Resources*, —U.S. at—,121 S. Ct. at 1843 3613(c)(2), and the ADA, 42 U.S.C. § 12205, and the Supreme Court's holding on how to interpret the term "prevailing party" was based on interpretations of those two statutes. The fee-shifting provision of the FHAA, in its entirety, states:

> In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

42 U.S.C .§ 3613(c)(2). Similarly, the provision involving entitlement to attorney's fees and costs under the ADA states:

> In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

42 U.S.C. §12205. These fee-shifting statutes provide broad discretion to the trial court or administrative body to determine whether a party can be considered a "prevailing party" and, if so, whether it is entitled to attorney's fees, without requiring the court or agency to consider the underlying merits of the dispute. The Buckhannon court also specifically listed three other statutes which have been consistently interpreted with the two statutes at issue in Buckhannon but the EAJA statute was not mentioned in this list *Buckhannon Bd.and Care Home, Inc. v. West Virginia Dept' of health and Resources*, —U.S. at—,121 S.Ct. at 1839. The three additional statutes referenced by the Buckhannon court contain language similar to the FHAA and the ADA fee-shifting provisions, providing the trial court with broad discretion and no requirement to review the underlying merits of the dispute. [FN4]

> [FN4]
> The attorney's fee provision in the Civil Rights Act of 1964 states:
> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k). In addition, the Voting Rights Act Amendments of 1975 provides: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1973/(e) . Finally, the Civil Rights Attorney's Fees Awards Act of 1976 states:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb[*et seq.*], title VI of the Civil Rights Act of 1964 [[42 U.S.C. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.
>
> 42 U.S.C. § 1988 (b) (Supp. IV 1998)

Although the statute at issue in the present case, the EAJA, 28 U.S.C. § 2412, also contains a "prevailing party" requirement, the plain language of the EAJA is significantly distinct from the language of the fee-shifting statutes examined and referenced in Buckhannon [FN5] The fee-shifting provision in the EAJA states:

> Except as otherwise specifically provided by statute, a court *shall* award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, *unless* the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412 (d) (a) (emphasis added). In contrast to the fee- shifting provisions examined by the Buckhannon court, EAJA

created a statutory presumption that attorney's fee awards "shall" be made "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412 (d) (1) (a); see H.R.Rep. No. 96-1418, at 9 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4987-88. Under EAJA, to determine whether the government's position was substantially justified, the court must analyze the law and examine the facts to determine "whether the government's overall position had a reasonable basis in both law and fact." Chiu v. United States, 948 F.2d 711,715 (Fed.Cir.1991)

> [FN 5] Although in its April 9, 2001 opinion, this court referred to cases examining other fee-shifting statutes to interpret the "prevailing party" requirement of the EAJA, the construction of the "prevailing party" requirement established by the majority of the Courts of Appeals at the time this court's opinion was issued, was consistent with the plain language and legislative history of the EAJA. The standards for meeting the "prevailing party" requirement recently set forth in Buckhannon conflict with the plain language and the legislative history of the EAJA, and the court now focuses on the distinctions between EAJA and other fee- shifting statutes.

Unlike the EAJA, the fee-shifting statutes examined in Buckhannon do not establish a presumption that the prevailing party is entitled to attorney's fees, nor do these other statutes require the court to make findings that the defendant was substantially unjustified and that no special circumstances exist to make the award unjust. The Supreme Court's concerns with permitting a plaintiff to attain "prevailing party" status based on a voluntary change in the defendant's conduct should not apply to EAJA. The Buckhannon court criticized the "catalyst theory" because it could permit a plaintiff to recover attorney's fees if it "established that the 'complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.'" *Buckhannon Bd. and Care Home Inc. v. West Virginia Dept' of Health and Human Services*, --U.S. at—,121 S. Ct. at 1841 (citing Brief for United States as Amicus

Curiae 27). The Court further explained that "[t]his is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary." Id. Finally, the Buckhannon Court refused to endorse a construction of "prevailing party" which "authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining judicial relief." Id.

Under EAJA, a plaintiff cannot recover attorney's fees merely by showing that its complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted. Even if a plaintiff files a nonfrivolous lawsuit, with sufficient merit to withstand a motion to dismiss, the plaintiff will not obtain an EAJA award if the government's position was "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S Ct. 2541, 101 L. Ed. 2d 490 (1988). In an EAJA claim, the court must consider the merits of the underlying lawsuit because it must determine whether the position taken by the United States—in the civil action and by the agency upon which the civil action is based—was substantially justified. *See* 28 U.S.C. § 2412 (d) (2) (D); *Comm'r Immigration & Naturalization Serv. V. Jean*, 496 U.S. 154, 158, 100 S. Ct. 2316, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990); *Gayette V. Office of Pers. Mgmt.*, 808 F.2d 1456,1467 (Fed. Cir. 1986) (the position of the United States includes that taken by the agency at the administrative level). Even if there occurred a voluntary change in the conduct of the government for an EAJA claim, the court would have to assess the merits of the government's action. In the cases in which the court finds that the government's position was not substantially justified and finds the government liable to the ***747** plaintiff for EAJA fees, the finding on the merits also would have been in favor of the plaintiff, even if the case has been resolved by means other than a formal written decision by the court[FN6]The "substantially justified" requirement of EAJA provides a safeguard to ensure that a plaintiff's victory had the necessary legal merit to support an award of attorney's fees. In sum, under EAJA, although a decision on the merits is not required for "prevailing party" status, a consideration of the merits during the review of the EAJA application is required.

> [FN6] In his concurrence, Justice Scalia identifies certain risks of endorsing and rejecting the "catalyst theory": "If the former sometimes rewards the plaintiff with a phony claim (there is no way of knowing), the latter sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment *Buckhannon Bd. and Care Home Inc. v. West Virginia Dept' of Health and Human Services*, —U.S. at—,121 S. Ct. at 1847 (Scalia, J., concurring). The "substantially justified" requirement under EAJA avoids one weakness of the "catalyst theory" because if the government's position at the agency level and/or during litigation was not substantially justified, there is little chance that an EAJA award will reward the plaintiff with a phony claim. Id. However, without the "catalyst theory," the risk of "den[ying] fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment" could still arise in EAJA cases in the appropriate factual situation. *Id.*

Because the "substantially justified" analysis directs the court to consider the merits of the case underlying the EAJA application, a plaintiff cannot prove the legal merits of the case solely through the "prevailing party" requirement. Therefore, under EAJA, the term "prevailing party" must mean something different from the term "prevailing party" used in the fee-shifting provisions examined and referenced in *Buckhannon*. The "substantially justified" requirement of EAJA takes pressure off the "prevailing party" requirement because examination of the underlying case is mandated. The inquiry under the "prevailing party" examination is directed to whether the plaintiff's lawsuit actually caused the agency to provide the relief the plaintiff requested. *See Niley v. Princini*, 242 F.3d 1050, 1054 (Fed. Cir.2001) (relying on causation to determine whether plaintiff was a "prevailing party" under EAJA). Because the plain language of the EAJA statute sets forth an additional "substantially justified" requirement in addition to the "prevailing party" requirement as well as a statutory presumption of award ("shall award to a prevailing party") that is not contained in the fee-shifting statutes examined in *Buckhannon* the court finds that

the *Buckhannon* interpretation of "prevailing party" does not resolve the fee-shifting questions raised under EAJA.

> [FN7] Defendant argues that "the Supreme Court's definition of prevailing party applies to EAJA as well as the FHAA and the ADA" and cites to *Schultz v. United States*, 918 F.2d 164, 166 n.2(Fed. Cir. 1990), to support its assertion. The court in Schultz analyzed the "prevailing party" requirement pursuant to a request for costs under RCFC 54(d). *Id.* at 165-66. Although the Schultz court cited to EAJA cases analyzing the definition of "prevailing party," the precise meaning of the "prevailing party" requirement under EAJA was not at issue in Schultz and was not resolved by the court. Id. Moreover, even if the Schultz ruling were extended to apply to EAJA cases, it would not support the defendant's contention that the *Buckhannon* standard applies to EAJA cases. The *Buckhannon* court distinguished the cases involving costs and the cases involving attorney's fees based on the "presumptive rule for costs" not contained in many attorney's fees statutes. *See Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Services*,—U.S. at—n.8,121 S Ct. at 1841 n. 8. Moreover, the costs award provision relied on in *Schultz* RCFC 54 (d), does not contain a requirement to review the merits of the underlying government actions and positions.

However, even if the *Buckhannon* standards were to be applied to recovery under the EAJA, the court's May 1, 2001 judgment need not be altered because the plaintiff Brickwood factually establishes itself as the "prevailing party" by meeting the concerns described in *Buckhannon*. In the case currently before the court, three days after the Navy attempted to convert its solicitation from an IFB to an RFP, the plaintiff filed a bid protest in this court, requesting the court to enjoin the Navy from converting the IFB to an RFP. *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. at 150.

After the court reviewed the factual and legal issues, the court held a hearing to discuss plaintiff's bid protest. At the hearing, the court stated:

> [I]t is a one-issue case and it is going to be up to me to decide whether or not the decision [to convert] and the procedures invoked in making that change were arbitrary and capricious or not.... and in the package that I had, I found no basis for the change that was made, so that if I get nothing further in terms of information, I will make a finding of arbitrary and capricious.

At the hearing, the defendant explained that the government's sole basis for the attempted conversion to an RFP was to solicit bids reflecting a deletion of the PCB testing requirements which had become unnecessary.[FN8] The court seriously questioned the defendant regarding whether the Navy had any evidence of a justification which would permit the conversion from an IFB to an RFP:

> The defendant explained the basis for the Navy's attempted conversion in the following exchange:
>
> THE COURT: Mr. Faver, is it in fact accurate for Plaintiff to describe your basis as wholly the PCB issue—
>
> MR. FAVER [Defendant's counsel]: Yes, Your Honor.
>
> THE COURT: ... I gather there's some PCB work still left to be done. Is that correct or not?
>
> MR. FAVER [Defendant's counsel]: No, there's no—
>
> THE COURT: So, it gets eliminated.... Okay, if you eliminated that—why did you go to a negotiated procurement? It's just a strange choice....
>
> MR. FAVER: I'm not too sure that that could have been easily done and reached the same and fair result that the negotiated procurement may result in. The bids have been opened, they have been reviewed by the—presumably by the other bidders.

THE COURT: ... [C]learly the fairest is, cancel it, go back, do another sealed. That's the easiest answer.

MR. FAVER: But perhaps not the most efficient under the given circumstances, which is why the FAR provides for this option, an alternative for converting to the RFP—

THE COURT: But it provides for the alternative with a very strong presumption that it's a rarity not to be gone to without good justification. And at least in this record so far, there is no justification. But granted, so far the record has been compiled by the Plaintiff. So, tell me what it is— what document—is there a contemporaneous document to when this occurred?

MR. FAVER: Not that I know of yet, Judge, I'm sorry.

THE COURT: You did ask that question, I am sure.

MR. FAVER: I'm not too sure. We were trying to really learn of the factual background and just find out who did what when and the like. But to my knowledge there is—when you say contemporaneous, meaning—

THE COURT: Justification, written justification.

MR. FAVER: For the decision to—

THE COURT: To go to a negotiated procurement and issue that amendment.... In other words, it doesn't say why. It just says, here's how we're doing it.

MR. FAVER: I know there's a lot of writings I haven't had a chance to receive or review. Whether or not any of those particular writings address that particular issue, I do not know as yet.

In this exchange, the court, although it did not issue a written opinion, announced its acknowledgment of the merits of plaintiff's claims, the rectitude of plaintiff's position and the error of defendant's actions. Defendant's counsel subsequently announced that the Navy had decided to postpone the opening of the proposals by one week to July 1, 1999 to allow counsel to discuss the issues further with each other and with their respective clients in order to see whether the protest could be resolved efficiently. On July 16, 1999, the defendant issued Amendment 0009, by which the government cancelled the solicitation,

with the intention of offering a new IFB, this time without options and without a requirement for PCB testing. That same day, the defendant filed a motion to dismiss in this court stating that:

> At the hearing on the plaintiff's motion for a temporary restraining order, the Court seriously questioned the decision to convert to a negotiated procurement and suggested that canceling the solicitation and re-soliciting using another sealed bid is the fairest and easiest way to proceed. After further consideration of both the circumstances surrounding the solicitation and the governing FAR provisions, and in light of the Court's comments at the TRO hearing, the Navy has canceled the solicitation and plans to re-solicit using a new IFB.

On July 22, 1999, in its order dismissing the case, the court noted that "the Department of the Navy canceled the solicitation that is the subject of this action" and dismissed plaintiff's protest. Although the court did not issue a written opinion on July 22, 1999, with a finding that the Navy had acted unlawfully, the court's comments at the TRO hearing represent the necessary "judicial imprimatur" that caused the change in the legal relationship of the parties. Based on the court's review of the documents related to the solicitation, the court clearly stated that it found "no basis" for the Navy's attempted conversion. The court also stated that a solution to dealing with the unnecessary PCB requirement would be to "cancel it, go back, do another sealed" and that "in this record so far, there is no justification" for the attempted conversion. In response to the court's request to provide a justification sufficient to support the government's decision to convert to an IFB, counsel for defendant was unable to provide one. The court's remarks clearly signaled that it intended to find that the Navy had acted arbitrarily and capriciously and to rule in favor of the plaintiff if the Navy could not produce evidence showing that it had a sufficient justification for the attempted conversion. After the defendant had an opportunity to review its documents, the defendant announced that it intended to follow the court's suggestion of canceling the original IFB and resoliciting another IFB. The defendant admitted that the Navy had decided to cancel the IFB "in light of the Court's comments." Moreover, the Navy had

not produced any additional documentation at the hearing or even after the administrative record was compiled for the EAJA application that demonstrated a justification sufficient to support a conversion from an IFB to an RFP. Thus, the court's remarks at the TRO hearing amounted to a finding that the Navy had acted unlawfully, and the defendant's change in conduct was a product of judicial action in the lawsuit.

As a trial court, this court is of the strong opinion that to interpret Buckhannon as requiring formal written judgments on the merits or formal findings of unlawful conduct will inhibit settlements and discourage parties from taking self-corrective action such as that taken by the defendant in Brickwood, Plaintiffs may be required to engage in protracted court proceedings and insist on written opinions in every action brought against the government, even when the merits of the plaintiff's claims are clear. The purpose of EAJA is to provide access to the courts to small businesses and individuals for review of or to defend against unreasonable government action without inhibition. *See* H.R. Rep. 96-1418, at 5, 1980 U.S.C.C.A.N. at 4984. When the federal government perceives that an employee or organization has taken inappropriate action, it has a duty to institute immediate remedial action without further imposing on the citizenry. Moreover, in government contract cases, such as the one currently before the court, the goal of promptly resolving a contract dispute, especially in pre-award cases, could be seriously impacted if the government feels it must balance the threat of even modest attorney's fees, as in the present case, against quickly resolving the dispute and issuing corrective action. Despite the absence of a written finding, because the court's actions altered the legal relationship of the parties, the court finds that the plaintiff in Brickwood is entitled to attorney's fees under EAJA.

CONCLUSION

For the foregoing reasons, the court finds that this court may properly consider an RCFC 60(b) motion for relief from judgment based on an alleged mistake of law. The court also finds that the discussion by the United States Supreme Court in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and human Resources*, —U.S. at—, 121 S Ct. 1835, 149 L Ed. 2d 855 (2001), should not bar

recovery by the plaintiff Brickwood in the case before the court. Plaintiff, therefore, is entitled to the award of attorneys' fees and costs previously awarded by this court in its May 1, 2001 judgment. The defendant's motion for relief from judgment is **DENIED**.

IT IS SO ORDERED.

United States Court of Federal Claims.

BRICKWOOD CONTRACTORS, INC., Plaintiff,
v.
UNITED STATES, Defendant.

No. 99-388C.

April 9, 2001.

Robert M. Moore, Moore & Lee, LLP, McLean, Virginia, attorney of record for the plaintiff, Charlie C.H. Lee and Kristen A. Bennett, of counsel.

Paul M. Faver, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., Robert E. Kirschman, Assistant Director, David M. Cohen, Director, attorneys of record for the defendant.

ORDER

HORN, Judge.

This matter comes before the court on the application of Brickwood Contractors, Inc. (Brickwood) for attorneys' fees and other expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C.§2412 (1994 & Supp. IV 1998). Plaintiff argues that it is entitled to an award of attorneys' fees and expenses under EAJA because (1) plaintiff's bid protest prevented the Navy from converting an invitation for Bids (IFB) to a Request for Proposals (RFP), thereby making the plaintiff the prevailing party in the matter; and (2) the government could not have met the regulatory requirements for such a conversion from an IFB to an RFP under Federal Acquisition Regulation (FAR) 14.404-1, for which reason the United States was not substantially justified in its actions. Plaintiff meets the eligibility criteria under the EAJA and seeks $11,134.22 in fees and expenses incurred in pursuing the bid protest and the instant application. After careful consideration of the record

before the court and the applicable law, the court finds that the defendant is liable to the plaintiff for EAJA fees and expenses.

FINDINGS OF FACT

On February 9, 1999, the Department of the Navy issued IFB No. N62477-97-B- 0083, Repair Elevated Water Storage Tanks, Naval Air Station, Patuxent River, Maryland. On March 24, 1999, the Navy issued Amendment 0003, which added three options to the original IFB and solicited bids for each of these options. The Amendment 0003 options included removing contaminated paint, performing wipe samples, testing the wipe samples, and disposing of all contaminated and uncontaminated waste. Amendment 0003 also added an Evaluation of Options Clause which provided:

> Except when it is determined in accordance with FAR 17.206(b) not to be in the Government's best interests, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of option(s) will not obligate the Government to exercise the option(s).

On March 30, 1999, the Navy issued Amendment 0004, which among other changes, added PCB (Polychlorinated Biphenyl) contamination testing to the base requirements. Amendment 0004 explained the criteria for exercising the options by stating:

> [I]f the above testing reveals that the exterior and/or interior paint coatings do contain PCB levels equal to or greater than 50 PPM, the elevated water storage tank debris will be considered a hazardous waste. In that event, the Government will award Options 1, 2, and/or 3 as the test results warrant.

On April 6, 1999, five bids, including that of the plaintiff, were received and publicly opened. Based upon the total price (base bid plus options), the Navy identified plaintiff as the apparent low bidder. Due to significant disparities in the bids, however, the Navy requested

a bid analysis to determine if the bids were unbalanced. Alpha Corporation, an independent consulting firm, issued a report on April 14, 1999, which stated:

> 1. There appears to be a considerable difference in the Bidders' understanding of the scope of work involved with the bid options.... As we all know, the interpretation of environmental regulatory requirements is both complex and variable. While the two low bidders interpreted the bid options properly, the other three low bidders appear to have misinterpreted the bid option requirements.
>
> 2. Because of the limited number of bidders, resulting from the limited number of appropriate tank manufacturers, statistical analysis of the distribution of bids is inconclusive. We feel that the even distribution of base bids within the bid result range (96% to 155% of the Government estimate) is common and appropriate.

Pursuant to Amendment 0004, the base specifications would have required the contractor to test for PCB contamination. However, in late April 1999, the Navy conducted tests on the water towers to determine if the options would ever need to be exercised. On April 29, 1999, the Navy concluded that there was no evidence of PCB contamination. Therefore on May 5, 1999, the Navy issued a Determination and Findings for Evaluating Bids Exclusive of Options, announcing that the bids on the options would be excluded from the final price evaluation because they were no longer needed. If the options had been evaluated along with the base bids, plaintiff would have had the low bid. If the options had not been evaluated, plaintiff would have been displaced by two other bidders who had lower base bids.

On June 15, 1999, the Navy issued Amendment 0005 to the solicitation, which did not cancel, [FN1] but extended, the solicitation by stating: "By amendment, this invitation for Bids (IFB) will be converted to a Request for Proposal (RFP) by the authority of Federal Acquisition Regulation (FAR) Part 14.404-1." Because the government

determined that the tanks contained no contaminated paint and that the options would never be exercised, Amendment 0005 also deleted the Evaluation of Options Clause and eliminated the requirements regarding PCBs.

> FN1. In his brief, defendant's counsel attempts to recharacterize the June 15, 1999 Amendment 0005 by stating, "Amendment 0005 *cancelled* the solicitation, rejected all bids, and stated that the agency would complete the procurement through price negotiations." (emphasis added). The same counsel for defendant, however, attaches the later, July 16, 1999 Amendment 0009 as evidence of cancellation of the solicitation.

On June 18, 1999, plaintiff filed a bid protest in the United States Court of Federal Claims alleging that "[t]he Navy's attempt to convert an IFB to an RFP, however, is not authorized by FAR or any other law or regulation." Plaintiff requested the court to enter judgment "enjoining the Navy from converting the IFB to an RFP," and "directing that the Navy proceed with the award of the contract to Brickwood."

On July 16, 1999, after plaintiff filed its lawsuit, the defendant issued Amendment 0009, by which the government did cancel the solicitation (N62477-97- R-0083), with the intention of offering a new IFB, this time without options and without a requirement for PCB testing. The Navy issued a Determination and Findings for Cancellation of Solicitation on July 16, 1999, stating that the "otherwise inadequate or ambiguous specifications for this project warrant cancellation and re-solicitation." Defendant filed a motion to dismiss in this court, arguing that "[b]ecause the cancellation renders the plaintiff's claim moot, the Court lacks jurisdiction and should dismiss this action." This court dismissed plaintiff's protest on July 22, 1999, without reaching the merits of the case.

The next day, on July 23, 1999, plaintiff filed a second bid protest, this time contesting the cancellation of the IFB. The plaintiff requested the court to "[d]eclare that the cancellation of the IFB was improper and enjoin further action by the Navy to resolicit the services under a new

IFB" and "[d]eclare that Brickwood is entitled to award of the contract under the procurement at issue in this action." The plaintiff alleged that the Navy's cancellation of the IFB had violated the FAR, constituted a breach of the implied obligation to treat each bid fairly and honestly, and initiated an improper auction. After reviewing the plaintiff's complaint and the applicable regulations, the court informed the plaintiff that it did not believe "that the Navy ha[d] acted arbitrarily or capriciously in canceling the bid and moving to award the contract through the issuance of a new solicitation." The plaintiff voluntarily dismissed its second bid protest on September 27, 1999. On August 23, 1999, the Navy issued a new solicitation (N62477-99-B-0088) for work on the water tanks at the Patuxent River Naval Air Station which did not include the PCB requirements. Brickwood was ultimately awarded the Patuxent River Naval Air Station contract on January 10, 2000.

On August 23, 1999, plaintiff filed an EAJA application seeking attorneys' fees and expenses for work performed on the first lawsuit protesting the Navy's conversion to an RFP and on the instant EAJA application. Plaintiff's itemized statement reflects that it seeks fees and expenses incurred from June 16, 1999 to August 20, 1999, thereby excluding any claim for fees and expenses associated with the second bid protest.

DISCUSSION

I. Background of EAJA and EAJA Requirements

"In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *see also Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 1 L.Ed. 613 (1796). "Absent statute or enforceable contract, litigants pay their own attorney's fees." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. at 247, 95 S.Ct. 1612 (citations omitted). This has come to be known as the "American Rule," and the only exceptions to this rule are those created by Congress and a small group of common law equitable exceptions which federal courts lack the power to enlarge. *See* id. at 269, 95 S.Ct. 1612. [FN2] In addition, litigants

seeking to recoup litigation expenses from the United States also face the barrier of sovereign immunity. *See Chiu v. United States*, 948 F.2d 711, 714 (Fed.Cir.1991); *Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456, 1460 (Fed.Cir.1986); *Griffin & Dickson v. United States*, 21 Cl.Ct. 1,4 (1990). Only a statutory directive waiving immunity can make the United States potentially liable in suit. *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976); *Soriano v. United States*, 352 U.S. 270, 276, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957).

> FN2. The Supreme Court in *Alyeska* noted the equitable exceptions of (1) willful disobedience of a court order, (2) bad faith on the part of a losing party, and (3) the common fund or common benefit exception allowing recovery of costs when the prevailing party is a trustee of property or is a party preserving or recovering a fund for the benefit of others in addition to himself. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. at 257-59, 95 S.Ct. 1612.

Congress recognized that the American Rule deterred individuals and small businesses "from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights." *Gavette v. Office of Pers. Mgmt.*, 808 F.2d at 1459(quoting H.R.Rep. No. 96-1418, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984); *see also PCI/RCI v. United States*, 37 Fed.Cl. 785, 788 (1997)(also quoting from H.R.Rep. No. 96-1418, at 5, 1980 U.S.C.C.A.N. at 4984). When the House of Representatives considered the Equal Access to Justice Act, it provided the following rationale:

> For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it.
>
> H.R.Rep. No. 96-1418, at 9, 1980 U.S.C.C.A.N. at 4988.

To address these concerns, in 1980, Congress enacted the EAJA. The purpose of the EAJA was to "reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney's fees, expert witness fees and other expenses against the United States." *Gavette v. Office of Pers. Mgmt.*, 808 F.2d at 1459-60 (quoting H.R.Rep. No. 96-1418, at 6, 1980 U.S.C.C.A.N. at 4984); *see also PCI/RCI v. United States*, 37 Fed.Cl. at 788 (also quoting from H.R.Rep. No. 96-1418, at 6, 1980 U.S.C.C.A.N. at 4984).

In order to accomplish its purpose, EAJA made two primary changes in the then prevailing law. *Gavette v. Office of Pers. Mgmt.*, 808 F.2d at 1460 (citing H.R.Rep. No. 96-1418, at 9, 1980 U.S.C.C.A.N. at 4987). First, EAJA section 2412(b) extended the existing common law and statutory exceptions to the American Rule to make the United States liable for attorney's fees just as private parties would be liable. Id. (citing H.R.Rep. No. 96-1418, at 9, 17, 1980 U.S.C.C.A.N. at 4987, 4996). [FN3] That section reads:

> FN3. The House Committee on the Judiciary stated that: Section 2412 (b) permits a court in its discretion to award attorney's fees and other expenses to prevailing parties in civil litigation involving the United States to the same extent it may award fees in cases involving other parties. Thus, under this subsection, cases involving the United States would be subject to the "bad faith," "common fund" and "common benefit" exceptions to the American rule against fee-shifting. The United States would also be liable under the same standards which govern awards against other parties under Federal statutory exceptions, unless the statute expressly provides otherwise.
>
> *Gavette v. Office of Pers. Mgmt.*, 808 F.2d at 1460(citing H.R.Rep. No. 96-1418, at 17, 1980 U.S.C.C.A.N. at 4996); *see, e.g., Knight v. United States*, 982 F.2d 1573, 1579-82 (Fed.Cir.1993)(common fund exception); *St. Paul Fire and Marine Ins. Co. v. United States*, 4 Cl.Ct. 762, 769 (1984)(bad faith exception).

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.
>
> 28 U.S.C. §2412(b). Prior to EAJA, many different statutes had contained specific waivers of sovereign immunity for the United States. *Gavette v. Office of Pers. Mgmt.*, 808 F.2d at 1460. EAJA section 2412 was enacted to provide a "uniform rule" which would "make such specific exceptions unnecessary." *Id.* (citing 28 U.S.C.A. §2412(Historical and Statutory Notes)).

The second primary change made by EAJA section 2412, given the ability of a party to collect fees against the government, was a statutory presumption that those awards were to be made "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A); *see* H.R.Rep. No. 96-1418, at 9, 1980 U.S.C.C.A.N. at 4987-88. EAJA section 2412(d)(1)(A) states:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. §2412(d)(a)(A). The "position of the United States" is further defined in EAJA section 2412(d)(2)(D) to mean:

> [I]n addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

28 U.S.C. §2412(d)(2)(D).

The United States Supreme Court noted in *Commissioner, Immigration & Natrualization Service v. Jean*, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed. 134 (1990), that "[a]ny given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case as an inclusive whole, rather than as atomized line-items." Id. at 161-62, 110 S.Ct. 2316. This position is reflected in United States Court of Appeals for the Federal Circuit cases. *See Gavette v. Office of Pers. Mgmt.*, 808 F.2d at 1467 (position of the United States includes that taken by the agency at the administrative level); *accord Doty v. United States*, 71 F.3d 384, 385-86 (Fed.Cir.1995); *Chiu v. United States*, 948 F.2d 711, 715 (Fed.Cir.1991) ("[W]hen assessing whether to award attorney's fees incurred by a party who has successfully challenged a governmental action in a particular court, the entirety of the conduct of government is to be viewed, including the action or inaction by the agency prior to litigation."); *KMS Fusion, Inc. v. United States*, 39 Fed.Cl. 593, 597 (1997).

Thus, eligibility for an award of attorney's fees and expenses in a civil action requires (1) that the claimant be a prevailing party; (2) that the government's position viewed over the entire course of the dispute was not substantially justified; (3) that no special circumstances make an award unjust; and (4) that pursuant to 2412(d)(1)(B), any fee application be submitted to the court within thirty days of final judgment in the action and be supported by an itemized statement. *See Comm'r. Immigration & Natrualization Service v. Jean*, 496 U.S. at 158, 110 S.Ct. 2316; 28 U.S.C.§2412(d)(1)(A).

A. Prevailing Party Status

To satisfy the first EAJA requirement, a plaintiff is a prevailing party if entitlement to some relief on the merits of one or more claims is established. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 & n.7, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)(standard is generally applicable in cases for which Congress authorizes an award of fees to a "prevailing party"); *Brewer v. American Battle Monuments Comm'n*, 814 F.2d 1564, 1567-69 (Fed.Cir. 1987). In *Austin v. Department of Commerce*, 742 F.2d 1417 (Fed.Cir.1984), the United States Court of Appeals for the Federal Circuit wrote:

> Although the EAJA does not define the term "prevailing party,""[a] typical formulation is that plaintiffs may be considered 'prevailing parties' for attorney fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)). The legislative history makes clear that prior judicial interpretations of the term "prevailing party" should be applied to the Equal Access to Justice Act and that the phrase should not be limited "to a victor only after entry of a final judgment following a full trial on the merits." H.R.Rep. No. 1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S.Code Cong. & Ad. News 4984, 4990. A party will be deemed prevailing if he obtains a settlement of his case; if the plaintiff has sought a voluntary dismissal of a groundless complaint; or even if he does not ultimately prevail on all issues. *Id.* The legislative history goes on to state:
>
> In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. A fee award may be appropriate where the party has prevailed on an interim order which was central to his case,

Parker v. Matthews, 411 F.Sup. 1059, 1064 (D.D.C. 1976), or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit," *Van Hoomissen v. Xeros Corp.*, 503 F.2d 1131, 1133 (9th Cir.1974).

It is therefore clear that a party need not have litigated to final judgment and have been awarded the ultimate relief requested in order to be entitled to an award of fees under the EAJA. As stated recently by this court, "[a] court should look to the substance of the litigation to determine whether an applicant has substantially prevailed in its position, and not merely the technical disposition of the case or motion." *Devine v. Sutermeister*, 733 F.2d 892, 898 (Fed.Cir. 1984).

Austin v. Department of Commerce, 742 F.2d at 1419-20.

Similarly, the United States Court of Appeals for the District of Columbia, in an action brought pursuant to the EAJA, determined that "[a] party need not procure a final judgment on the merits in order to be considered a 'prevailing party' for fee-shifting purposes. It is enough that the lawsuit was a 'causal, necessary, or substantial factor in obtaining the result' plaintiff sought." *Public Citizen Health Research Group v. Young*, 909 F.2d 546, 549 (D.C.Cir.1990) (quoting *Comm'rs Court of Medina County, Texas v. United States*, 683 F.2d 435, 442 (D.C.Cir. 1982).

Furthermore, in *Miley v. Principi*, 242 F.3d 1050 (Fed.Cirl 2001), the court held that: "We agree ... that there is no absolute prohibition against basing such a showing [of causation] on timing alone." The *Principi* court also stated that: "Thus, in *Public Citizen Helath Research Group v. Young*, 909 F.2d 546 (D.C Cir.1990), the court noted that the basic inquiry under the catalyst theory [FN4] is one of causation, and that in the absence of alternative explanations, a lawsuit followed by agency action can be strong evidence of causation." Id. at 551 (citing *Save Our Cumberland Mountains, Inc. v.Hodel*, 826 F.2d 43, 51 (D.C.Cir. 1987)); *see also Hooper v. Demco, Inc.*, 37 F.3d 287, 292 (7th Cir. 1994). *Id.* at 1054.

FN4. At least one Court of Appeals has interpreted the Supreme Court decision in *Farrar v. Hobby*, 506U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), as rejecting the catalyst theory. *See S-1 & S-2 v. State Bd. Of Educ. Of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994)(en banc). However, other Courts of Appeals have "expressly concluded that *Farrar* did not repudiate the catalyst theory" or have "continued to apply the catalyst theory notwithstanding *Farrar*" *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 194, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)(citing cases). The Supreme Court has granted certiorari in a case in which the viability of the catalyst theory is directly at issue. *See Buckhannon Bd. & Care Home, Inc. v. W.Va. Dep't of Health & Human Res.*, 203 F.3d 819 (4th Cir. 2000), *cert. granted,* 530 U.S. 1304, 121 S.Ct. 28, 147 L.Ed.2d 1050)(2000) (No. 99-1848).

In a case interpreting the prevailing party requirement with respect to obtaining attorney's fees under 42 U.S.C. §1988, [FN5], the United States Supreme Court, in Hewitt v. Helms, 482 U.S. 755, 760-61, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) offered the following advice:

FN5. 42 U.S.C. §1988 is similar in purpose to EAJA and authorizes a claim for attorney's fees for prevailing parties on certain claims. The statute provides that:

[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity

> such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.
>
> 42 U.S.C. §1988(b) (Supp. IV 1998).
>
> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under [42 U.S.C.] §1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Hewitt v. Helms, 482 U.S. at 760-61, 107 S.Ct. 2672. Although the *Hewitt* Court interpreted the "prevailing party" element in the context of 42 U.S.C. §1988, this construction of prevailing party is consistent with the policy behind EAJA, to compensate parties who cause the government to conform to the law.

B. Substantial Justification

Regarding the second EAJA requirement, when a party has prevailed in litigation and filed an EAJA claim against the government, the government bears the burden of establishing that its position was substantially justified. *See* 28 U.S.C. §2412(d)(1)(A); *Comm'r. Immigration & Natrualization Service v. Jean*, 496 U.S. at 158, 110 S.Ct. 2316; *Doty v. United States*, 71 F.3d 384, 385 (Fed.Cir. 1995)(citing *Gavette v. Office of Pers. Mgmt.*, 808 F.2d at 1465-66; *PCI/RCI v. United States*, 37 Fed.Cl. at 788). The Supreme Court has held that "substantially justified" does not mean " 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). It is no different from the "reasonable basis in both law and fact" formulation used by the majority of Courts of Appeals. *Id.* It

does, however, mean more than merely undeserving of sanctions for frivolousness. *Id.* at 566, 108 S.Ct. 2541 Thus, when determining whether the overall position of the United States was substantially justified, a court should "look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F.2d at 715. As noted earlier with respect to the interpretation of "position of the United States" under EAJA, the government must show that its actions were substantially justified throughout the entire dispute, not just during the litigation phase. *See Gavette v. Office of Pers. Mgmt.*, 808 F.2d at 1467.

Whether the government's position was substantially justified is a factual determination which must be made on a case-by-case basis. *See Cmty, Heating & Plumbing Co., Inc. v. Garrett*, 2 F.3d 1143, 1145 (Fed.Cir. 1993). Objective indicia "such as the terms of a settlement agreement, the stage in the proceedings at which the merits were decided, and the views of other courts on the merits" can be relevant, but are not necessarily conclusive. *See Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541. Also relevant are the state of the law when the government took its position, *see Owen v. United States*, 861 F.2d 1273, 1274-75 (Fed.Cir. 1988), and the factual complexity or novelty of the subject matter, *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 468 (Fed. Cir.), *cert. denied*, 488 U.S. 819, 109 S.Ct. 60, 102 L.Ed.2d 38 (1988).

C. Special Circumstances

The third requirement for the evaluation of an EAJA claim is the consideration of any special circumstances that would make the award of EAJA fees to the plaintiff unjust. *See* 28 U.S.C. §2412(d)(1)(A); *Comm'r. Immigration & Natrualization Service v. Jean*, 496 U.S. at 158, 110 S.Ct. 2316. In *L.G. Lefler, Inc. v. United States*, 801 F.2d 387 (Fed.Cir. 1986), the United States Court of Appeals for the Federal Circuit quoted the congressional history of the EAJA to explain the purpose of the "special circumstances" clause:

> This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel

> but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

L.G. Lefler, Inc. v. United States, 801 F.2d at 389 (quoting H.R.Rep. No. 96-1418, at 11, 1980 U.S.C.C.A.N. at 4990).

D. Filing Requirements

The fourth EAJA requirement is that the fee application be submitted to the court within thirty days of final judgment in the action and be supported by an itemized statement. *See Comm'r. Immigration & Natrualization Service v. Jean*, 496 U.S. at 158, 110 S.Ct. 2316. Final judgment means "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. §2412(d)(2)(G).

II. Application of EAJA Requirements

A. Prevailing Party

In the first bid protest, plaintiff requested that the Navy be enjoined from converting the IFB to an RFP and that the Navy be directed to award the contract to Brickwood. In its second complaint, plaintiff requested the court to declare that cancellation of the IFB and resolicitation of the contract under a new IFB was improper and that Brickwood was entitled to an award of the contract. Defendant argues that plaintiff "is not the prevailing party because it failed to obtain the substantive relief sought in its [first] complaint." Defendant contends that because plaintiff ultimately sought an award of the contract in both the first and the second bid protest, plaintiff clearly did not achieve the relief it sought in the first bid protest. The defendant states:

> Brickwood suggests in its EAJA application that it prevailed "by stopping the conversion of the solicitation to a negotiated procurement." However, Brickwood's second protest rebuts the suggestion that "stopping the conversion" was the relief sought in this protest. In the

> second case, Brickwood sought the identical relief that it sought in this case, *i.e.*, award of the contract without any further competition.

As noted above, the Court of Appeals for the Federal Circuit has stated that "plaintiffs may be considered 'prevailing parties' for attorney fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Austin v. Dep't of Commerce*, 742 F.2d at 1419 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933 (1983)). Although plaintiff in the first protest did not receive an award of the contract as it had requested, plaintiff significantly contributed to producing a "voluntary action by the defendant that affords the plaintiff all or some of the relief [it] sought through a judgment ...." *Hewitt v. Helms*, 482 U.S. at 760, 107 S.Ct. 2672. There is nothing novel or dispositive about the fact that in both protests, the plaintiff's ultimate goal was the award to itself of the contract at issue. The fact that the plaintiff continued to seek an award of the contract to itself in the second protest does not preclude a finding that plaintiff achieved substantive relief in the first bid protest.

Although there was no final judgment on the merits issued in the first bid protest, defendant, in its Motion to Dismiss, stated:

> At the hearing on the plaintiff's motion for a temporary restraining order [TRO], the Court seriously questioned the decision to convert to a negotiated procurement and suggested that canceling the solicitation and re-soliciting using another sealed bid is the fairest and easiest way to proceed. After further consideration of both the circumstances surrounding the solicitation and the governing FAR provisions, and in light of the Court's comments at the TRO hearing, the Navy has cancelled the solicitation and plans to resolicit using a new IFB.

Defendant's counsel also stated in court:

> Cancelling the solicitation is the right thing to do and to proceed with the new IFB.... That is the conclusion we

> reached when we *reconsidered* the facts and circumstances of FAR [p]rovisions and the like and it is the right thing but it is also the fair thing, although fairness isn't discussed in FAR.

(emphasis added). Thus, the Navy's decision not to convert the IFB to an RFP, but to cancel the original solicitation and resolicit was the product of reconsideration by the government, which followed the filing of plaintiff's first bid protest and the ensuing court proceedings on plaintiff's cause of action. In the first bid protest, plaintiff sought to prevent the Navy from completing an announced conversion from an IFB to an RFP, and plaintiff's lawsuit achieved this result by forcing the Navy to reevaluate, cancel and resolicit, instead of pursuing the conversion. The government's reevaluation and subsequent decision not to convert occurred within twenty-eight days after the plaintiff filed its first case requesting injunctive relief, and, as stated by the defendant, "in light of the court's comments at the TRO hearing." The government has offered no alternative explanation for why it changed its mind and proceeded to cancel and issue a new RFP. The court finds that plaintiff meets the first EAJA requirement because it achieved a result on a significant issue in the litigation, which resulted in a benefit to the plaintiff, and therefore, plaintiff was the prevailing party in the first bid protest.

B. Substantial Justification

Regarding the second EAJA requirement, plaintiff alleges that the agency action of converting the IFB to an RFP was not substantially justified. Defendant argues that the Navy's conversion and decision to conduct price negotiations was substantially justified because the conversion is permitted under FAR 14.404-1. FAR 14.404-1(a)(1) states:

> (1) Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

48 C.F.R. §14.404-1(a)(1)(1999).

FAR 14.404-1(c) enumerates an exhaustive list of the reasons which are sufficiently compelling to justify canceling an invitation for bids after the bids have been opened. FAR 14.404-1(c)states:

> (c) Invitations may be canceled and all bids rejected before award but after opening when, consistent with paragraph (a)(1) above, the agency head determines in writing that—
>
> > (1) Inadequate or ambiguous specifications were cited in the invitation;
> >
> > (2) Specifications have been revised;
> >
> > (3) The supplies or services being contracted for are no longer required;
> >
> > (4) The invitation did not provide for consideration of all factors of cost to the Government, such as cost of transporting Government-furnished property to bidders' plants;
> >
> > (5) Bids received indicate that the needs of the Government can be satisfied by a less expensive article differing from that for which the bids were invited;
> >
> > (6) All otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the contracting officer cannot determine the reasonableness of the bid price;
> >
> > (7) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith ...;
> >
> > (8) No responsive bid has been received from a responsible bidder;
> >
> > (9) A cost comparison ... shows that performance by the Government is more economical; or

(10) For other reasons, cancellation is clearly in the public's interest.

48 C.F.R. §§14.404-1(c)(1)-(10).

FAR 14.404-1(e) and (f) set forth the appropriate agency action following a cancellation:

(e) Under some circumstances, completion of the acquisition after cancellation of the invitation for bids may be appropriate.

(1) If the invitation for bids has been canceled for the reasons specified in subparagraphs (c)(6), (7), or (8) of this subsection, and the agency head has authorized, in the determination in paragraph (c) of this subsection, the completion of the acquisition through negotiation, the contracting officer shall proceed in accordance with paragraph (f) of this subsection.

(2) If the invitation for bids has been canceled for the reasons specified in subparagraphs (c)(1), (2), (4), (5), or (10) of this subsection, or for the reasons in subparagraphs (c)(6), (7), or (8) of this subsection and completion through negotiation is not authorized under subparagraph (e)(1) of this subsection, the contracting officer shall proceed with a new acquisition.

(f) When the agency head has determined, in accordance with paragraph (e)(1) of this subsection, that an invitation for bids should be canceled and that use of negotiation is in the Government's interest, the contracting officer may negotiate ... and make award without issuing a new solicitation provided ....

48 C.F.R. §§14.404-1(e)(1)-(2), (f). Thus, if (e)(1) applies, the FAR permits conversion to a negotiated procurement without a new

solicitation. If (e)(2) applies, a new solicitation must be issued following a cancellation.

1. FAR 14.404-1(c)(3)

Defendant claims that the Navy relied on both FAR 14.404-1(c)(3) and (c)(6) to justify canceling the IFB. FAR 14.404-1(c)(3) allows for cancellation of an IFB when "[t]he supplies or services being contracted for are no longer required." 48 C.F.R. §§14.404-1(c)(3). Assuming for the moment that the present case fits under the (c)(3) criteria, the FAR (at FAR 14.404-1(e)(1) does not permit a conversion to a negotiated procurement when an IFB is cancelled under (c)(3). Subsection (c)(3) is not listed in either (e)(1), which lists the circumstances pursuant to which a conversion to an RFP is permitted, or (e)(2), which lists the circumstances in which a new solicitation must be issued. Logically, for those sections not listed under FAR 14.404-1(e), completion of the acquisition is not appropriate because the acquisition is no longer required. The only two unlisted subsections are (c)(3) and (c)(9). Award of a contract is not necessary under (c)(3) because the supplies or services are no longer required, nor under (c)(9) because performance of the solicited work by the government is more economical.

Defendant argues that the omission of (c)(3) from subsection (e) must mean that a cancellation pursuant to (c)(3) may be resolicited either as a new acquisition or through negotiation, and that "contracting officers are presumably free to exercise their own discretion in this situation." However, this interpretation is not supported by the language of the FAR. FAR 14.404-1(e)(1) sets forth a discreet list of the justifications in which a conversion to an RFP is allowed. "The contracting officer may negotiate ... and make award without issuing a new solicitation," 48 C.F.R. §14.404-1(f), "[i]f the invitation for bids has been canceled for the reasons specified in subparagraphs (c)(6), (7), or (8) of this subsection ...." 48 C.F.R. §14.404-1(e)(1). Because (c)(3) does not appear on the list of circumstances in which the government may convert to an RFP, the explicit language of the FAR does not permit conversion to a negotiated procurement after a(c)(3) cancellation.

In addition, (c)(3) is not a valid justification for canceling the IFB in this case. Subsection (c)(3) permits cancellation when "[t]he supplies or services being contracted for are no longer required." 48 C.F.R. §14.404-1(c)(3). Defendant argues that (c)(3) applies to this case because "a material portion of the services being contracted, namely the testing and disposal of PCBs, were no longer required." Defendant attempts to extend (c)(3) to the current situation in which only a portion of the services are no longer required. However, the language of (c)(3) addresses cancelling the requirement, apparently in its entirety, not a partial cancellation. *See, e.g., S. Systems Corp.*, 95-1 CDP ¶221, 1995 WL 248585 (1995)[FN6](finding that cancellation of IFB for repairs to an airport runway proper under (c)(3) because the repairs were not necessary until a separate runway project was completed); *Flintstone Crushing & Constr. Co.*, 91-1 CPD ¶216, 1991 WL 73005 (1991)(upholding cancellation of an IFB under (c)(3) when construction of a timber access road became unnecessary because defendant discovered that the road was prohibited by a court injunction); *R.H.G. Systems, Inc.*, 86-2 CPD ¶380, 1986 WL 64157 (1986) (affirming cancellation of the IFB under (c)(3) when building renovations became unnecessary once the troops housed in the subject buildings were relocated). No cases have been identified in which (c)(3) has been validated as an appropriate basis for cancellation when only a portion of the original solicitation has become unnecessary.

> FN6. Although decisions of the GAO are not binding on this court, they evidence expertise and offer useful guidance. *See Compliance Corp. v. United States*, 22 Cl. Ct. 193, 204 N.8 (1990), *aff'd*, 960 F.2d 157 (Fed.Cri. 1992); *RADVA Corp v. United States*, 17 Cl.Ct. 812, 822 N.13 (1989), *aff'd*, 914 F.2d 271 (Fed.Cir. 1990); *CACI Field Servs. V. United States*, 13 Cl. Ct. 718, 731 n.28 (1987), *aff'd*, 857 F.2d 464 (Fed.Cir. 1988).

In the present case, the Navy still requires the bulk of the solicited services to be completed. The government admits that, after its attempt to convert, it still needed "[t]o secure a contractor to complete the work that is required and that is to remove these water tanks." Because defendant still requires an award to be made, (c)(3) does not provide a justification for canceling the original IFB issued in this case.

Partial elimination of requirements have justified cancellation under (c)(1). 48 FAR 14.404-1(c)(1) permits cancellation of a solicitation when "[i]nadequate or ambiguous specifications were cited in the invitation." 48 C.F.R. §14.404-1(c)(1). Cancellation under (c)(1) has been upheld when the requirements of the original solicitation have been partially deleted, as in the present case. *See, e.g., Eastern Technical Enterprises, Inc.*, 99-1 CPD ¶17, at 3, 1999 WL 24651 (1999) (affirming cancellation under (c)(1) because "much of the solicited work ... is no longer needed to meet the agency's actual needs"); *P&C Constr.*, 93-1 CPD ¶361, at 2, 1993 WL 156632 (1993)(finding cancellation of the IFB proper under (c)(1) when "some of the work required under the IFB had already been performed"). In the present case, the Navy performed the PCB testing required in the solicitation on its own. The specifications in the original solicitation were deemed inadequate because the Navy no longer required the PCB testing requirement, so that (c)(1) might have supported a cancellation in this case.

Additionally, FAR 14.404-1(c)(2) permits cancellation when "[s]pecifications have been revised," 48 C.F.R. §14.404-1(c)(2). Cancellation of an IFB under 14.404-1(c)(2) is proper "when an award under the solicitation would not serve the actual needs of the government." *EDL Constr., Inc.*, 99-1 CPD ¶34, at 3, 1999 WL 71271 (1999); *accord Zwick Energy Research Org., Inc.*, 91-1 CPD ¶72, at 3, 1991 WL 72881 (1991); *Magnolia Inn*, 85-1 CPD ¶257, at 3, 1985 WL 52361 (1985). The current case might have been supportable under the (c)(2) criteria because the original solicitation includes an unnecessary PCB testing requirement and does not reflect the government's current needs. [FN7]

> FN7. FAR 14.404-1(c)(2) generally has been applied as a basis for cancellation when the specifications have been changed or when additional requirements were needed. *See, e.g., Robert Hall Assocs., Inc.* 95-2 CPD ¶189, 1995 WL 625602 (1995)(upholding cancellation under (c)(2) when the Army required additional landscaping services not reflected in the original solicitation); *Zwick Energy Research Org., Inc.*, 91-1 CPD ¶72, 1991 WL 72881 (1991)(finding cancellation

under (c)(2) proper when the Army required air compressors designed to use diesel fuel rather than the gasoline-type fuels allowed in the original solicitation); *Snowbird Indus., Inc.*, 87-1 CPD ¶630, 1987 WL 102534 (1987) (affirming cancellation under (c)(2) when the government required a different type of stainless steel and additional specifications in the design of ice cube making machines).

In *Aviation Enterprises, Inc. v. United States*, 8 Cl. Ct. 1 (1985), a judge of the United States Claims Court examined whether the Air Force had properly cancelled an RFP. *Id.* at 4. The *Aviation Enterprises* court determined that FAR 14.404-1 governed this cancellation because the Air Force cancelled the solicitation after the best and final offers of the bidders had been publicly opened. Id. at 20. The solicitation called for a type of aircraft which exceeded the government's needs by requiring "jet aircraft to perform a mission which turbo-prop aircraft could perform. The use of turbo- prop planes would save the taxpayers money." *Id.* at 21. The court considered (c)(1), (c)(2), (c)(5), [FN8] and (c)(9) as possible justifications for cancellation of the solicitation at issue. Although the court did not attribute the overstatement of specifications to one particular justification, the court identified (c)(1), (c)(2), and (c)(5) as proper bases for cancellation when the government has overstated its needs in the solicitation. *See* id.

FN8. FAR 14.404-1(c)(5) is not a proper justification in the present case because the nature of the present overstatement is a partial deletion of requirements, not the opportunity to procure a "less expensive article" that will satisfy the government's needs. *See* 48 C.F.R. §14.404-1(c)(5).

Cancellation in the case before this court, based on the changed requirements, might have been appropriate under categories (c)(1) or (c)(2). A determination regarding which category applies, (c)(1) or (c)(2), however, does not affect the disposition of this case because neither category supports a conversion to an RFP. Subsection (e)(2) controls the government's conduct after a cancellation under (c)(1) or

(c)(2). FAR 14.404-1 (e)(2) provides, "[i]f the invitation for bids has been cancelled for the reasons specified in subparagraphs (c)(1), (2), (4), (5), or (10) of this subsection, ... the contracting officer shall proceed with a new acquisition." 48 C.F.R. §14.404-1(e)(2). Subsection (f), which governs conversions to a negotiated procurement, does not apply to the present case. To fit into the criteria for a conversion to negotiation under subsection (f), the original solicitation must have been cancelled for the reasons specified in subsections (c)(6), (7), or (8). *See* 48 C.F.R. §14.404-1(e)(1). Because under the applicable regulations, the elimination of the PCB requirement provides a justification under (c)(1) or (c)(2), the change in the requirements should have resulted in a cancellation followed by the issuance of a new solicitation. *See* 48 C.F.R. §14.404-1(e)(2). The Navy's attempted conversion to a negotiated procurement allegedly based on 14.404-1(c)(3) prior to the initial filing of plaintiff's first complaint filed in this court was unjustified under the FAR.

2. FAR 14.404-1 (c)(6)

Alternatively, defendant argues that it justifiably cancelled the IFB pursuant to 48 C.F.R. §14.404-1(c)(6), which permits cancellation when "[a]ll otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the contracting officer cannot determine the reasonableness of the bid price." 48 C.F.R. §14.404-1(c)(6). Defendant argues that "each bid received in connection with the original solicitation was either unreasonable or incapable of being characterized as either reasonable or unreasonable."

Defendant contends that the "significant disparities in the bids" leading to the Navy's request for a bid analysis,[FN9] and the independent consultant's determination that "a majority of the bidders misinterpreted the requirements relating to PCBs" show that the bids were unreasonable. However, the FAR permits cancellation under (c)(6) when all the bids received are unreasonable. *See* 48 C.F.R. §14.404-1(c)(6); *see, e.g., Howard w. Pence, Inc.*, 97-2 CPD ¶150, at 2, 1997 WL 724544 (1997); *J.Morris & Assoc*, 94-2 CPD ¶47, at 1-2, 1994 WL 396414 (1994); *Metrick Constructors, Inc.*, 88-1 CPD ¶311, at 2, 1988 WL 227291 (1988). In the instant case, the independent

consultant indicated that two bidders interpreted the bid options properly and that the distribution of base bids was "common and appropriate." An unsupported allegation of disparities in the bids and the independent consultant's conclusion that some of the bidders may have misinterpreted the PCB requirements are insufficient to cancel the solicitation under the language of FAR 14.404-1(c)(6).

> FN9. The Navy requested a bid analysis because "it appear[ed] that bids [were] unbalanced," not because of "significant disparities in the bids." An "unbalanced bid" has a specific meaning in the area of government acquisitions. FAR 52.214-10(e)provides:
>
> > A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment.
>
> 48 C.F.R. §52.214-10(e) (1999). Defendant does not allege that any bids were rejected because of a material imbalance within the meaning of FAR 52.214-10(e). In addition, the independent consultant did not provide conclusions regarding any imbalance in the bids. Thus, the court need not address the issue of unbalanced bids within the meaning of FAR 52.214-10(e).

Defendant also alleges that because the base bids included the cost of unnecessary PCB testing and because the Navy could not evaluate the cost of the PCB testing as opposed to the base bids, the Navy could not determine the reasonableness of the base bids. Defendant argues that the Navy's inability to determine the reasonableness of the bids provides sufficient justification to cancel under (c)(6). FAR 14.404-1(c)(6), however, allows for cancellation of the IFB only when all bids are received at unreasonable prices, or only

one bid is received and the contracting officer cannot determine the reasonableness of the bid price. *See* 48 C.F.R. §14.404-1(c)(6). Subsection (c)(6) does not permit cancellation in situations like the present case. Here, the Navy received five bids, and there is no evidence in the record that all five bids were unreasonable or that a determination of unreasonableness was made. Thus, the requirements for a(c)(6) cancellation have not been met in this case.

In addition, the Navy inappropriately relies on (c)(6) because the cause of the Navy's alleged inability to determine the reasonableness of the bids is the inaccurate or changed specifications. If an invitation for bids contains inaccurate requirements, the deficiency is not in the bids, but in the specifications. Under defendant's view of the facts, whenever an IFB contains inaccurate specifications and requests a lump sum bid, the IFB could be cancelled under (c)(6) with the government's claim that it cannot sever the defective component from the base bid. In other words, any IFB that requested a lump sum bid and could be cancelled under (c)(1) or (c)(2) also could be cancelled under (c)(6). This result would diminish the effect of subsection (e), which governs post-cancellation procedures. The distinction made in subsection (e) between justifications in which a conversion is permitted and justifications in which a new solicitation is mandated would be lost under defendant's interpretation. For example, if the government had issued inadequate specifications and sought to cancel the IFB, but wanted to avoid the new solicitation mandated by (e)(2), the government could simply invoke (c)(6), claiming that it was unable to determine the reasonableness of the bids and convert to an RFP under (e)(1). In the present case, any inability to determine the reasonableness of the bids is the result of the inaccurate or changed requirements. As noted above, the defective requirements in this case will only support a cancellation under FAR 14.404-1(c)(1) or (c)(2), followed by the new solicitation required by FAR 14.404-1(e)(2).

The contracting officer is vested with broad authority to cancel an IFB based on the unreasonableness of the prices bid pursuant to 14.404-1(c)(6). *See Overstreet Elec. Co., Inc. v. United States*, 47 Fed.Cl. 728, 732 (2000)(quoting *Caddell Constr. Co. v. United States*, 7 Cl.Ct. 236, 241 (1985)). In this record, however, there is no evidence

demonstrating that the Navy actually believed that the bids received were unreasonable. Amendment 0005, which converted the IFB to an RFP, did not provide any justification for the conversion. At the hearing regarding plaintiff's request for a Temporary Restraining Order, defendant stated that the basis for the attempt to convert to an RFP rested solely on the elimination of the PCB testing requirement. [FN10] At this hearing, defendant did not state that the unreasonableness of the bids also served as a basis for the conversion. Later, when the Navy decided to cancel the IFB instead of converting to an RFP, the Navy again did not cite to the unreasonableness of the bids as a basis for the cancellation. In its Determination and Findings issued on July 16, 1999, just before cancellation of the original solicitation, but after the filing of the first lawsuit, the Navy stated: "The material revisions that must be made to the otherwise inadequate or ambiguous specifications for this project warrant cancellation and re-solicitation." The Navy then concluded that, "[b]ecause the criteria set forth in FAR 14.404-1(c)(1) and (c)(2)have been met, the agency will cancel the solicitation and proceed with a new acquisition pursuant to FAR 14.404-1(e)(2)." Thus, even after the first protest was filed, the Navy did not mention the unreasonableness of the prices bid or FAR 14.404-1(c)(6) as a basis for cancellation. Although the government is allowed to "advance its post hoc justifications for the cancellation," *Vanguard Sec. Inc.v . United States*, 20 Cl.Ct. 90, 111 (1990), the government has presented no evidence that suggests that the Navy could substantiate a finding that the base bids were unreasonable.

> FN10. The court inquired into the basis for the government's decision to convert in the following exchange:
>
> THE COURT: ... What was the basis [for the conversion], as you understand it, and what documents do I look at to determine that ... this was not an arbitrary and capricious act on the part of your client?
>
> MR. FAVER (Defendant's Counsel): ... What had happened was there were options along with the original I.F.B.... And those options were in large part connected

> with some testing—PCB-testing requirements in the initial I.F.B. As a result, some confusion had occurred. The contracting officer, in the light, decided, well, we'd better go out and just test it ourselves and make this determination whether or not there's PCB paint that needs to be removed and disposed of and then remove all of that confusion, remove the particular testing requirements which, ... could be a very significant sum of money that constitutes this particular solicitation.... The testing component, the PCB-testing component, could be a material part of this solicitation. And the fair thing to do, the right thing to do, is say, hey, you know, let's delete this requirement and let the people who participate in the I.F.B. now—, absent this
>
> THE COURT: ... Mr. Faver, is it in fact accurate for Plaintiff to describe your basis [for the Navy's action] as wholly the PCB issue—
>
> MR. FAVER (Defendant's Counsel): Yes, Your Honor.

FAR 14.404-1 specifically limits the contracting officer's discretion regarding whether the government may cancel an IFB, whether the government may complete the acquisition after a cancellation, and how the government should complete the acquisition. The FAR provides explicit detail regarding the situations under which a cancellation is permitted after the opening of bids, and a discreet list of the circumstances in which the government may convert to an RFP. In the present case, the Navy could not have cancelled the IFB under (c)(3), (c)(6), or any justification which could have led to a conversion. Because the PCB testing requirements needed to be deleted, the Navy could have and ultimately did base its cancellation on the "inadequate or ambiguous specifications" and cancelled pursuant to (c)(1) and (c)(2). Under the FAR, however, a cancellation pursuant to (c)(1) or (c)(2) can only be followed by a new solicitation. Thus, the Navy's attempted conversion to an RFP was not substantially justified.

3. Procedures for cancellation of IFB

Moreover, the Navy failed to follow the procedures set forth under FAR 14.404-1. The bids were opened on April 6, 1999, the Navy attempted to convert to a negotiated procurement on June 15, 1999, the plaintiff filed its bid protest on June 18, 1999, and the solicitation was cancelled on July 16, 1999. FAR 14.404-1 specifically outlines the IFB cancellation procedures after bids have been opened. First, award is to be made to the lowest bidder, unless there is a compelling reason to cancel the bids. 48 C.F.R. §14.404-1(a)(1). Second, if a compelling reason arises, the IFB must be cancelled and all bids rejected. 48 C.F.R. §14.404-1(c). Third, the agency head or designate must determine, in writing, that the IFB is to be cancelled for one of the reasons enumerated in FAR 14.404-1(c). *Id.* Finally, after the IFB is cancelled, the agency head must follow the post-cancellation procedures under FAR 14.404-1(e), which may permit a conversion to an RFP or mandate the issuance of a new solicitation. 48 C.F.R. §14.404-1(e).

Here, the Navy did not cancel the solicitation until after it had attempted to convert to a negotiated procurement. In fact on June 15, 1999, Amendment 0005 extended the solicitation stating, "[b]y amendment, this Invitation for Bids (IFB) will be converted to a Request for Proposal (RFP) ...." On July 16, 1999, after plaintiff protested the conversion on June 18, 1999, the defendant issued Amendment 0009, which stated, "[t]he subject solicitation is hereby cancelled in its' [sic] entirety." Defendant's attempt to convert before cancelling the IFB is not permitted under the procedures outlined in the FAR. *See* 48 C.F.R. §14.404-1(e).

Finally, defendant has failed to produce for the court the written documentation required by FAR 14.404-1. Section (c) provides that "[i]nvitations may be cancelled and all bids rejected before award but after opening when ... the agency head determines in writing that [one of the enumerated justifications apply]." 48 C.F.R. §14.404-1(c). The defendant admits that "the Navy did not prepare a written determination andfindings prior to issuing Amendment 0005 ...." The defendant attempts to justify the agency head's failure to document its rationale in writing by citing to *Cubic Applications, Inc. v. United States*, 37

Fed.Cl. 345 (1997). However, *Cubic* merely stands for the proposition that the absence of a Determination and Findings is not dispositive. *See* id. at 357-58. Instead, the court must "ask whether it is in the public interest to insist on adherence to the requirements of [the statute] in the present circumstances." Id. at 357. Although the defendant characterizes the preparation of a Determination and Findings as "a matter of form rather than substance," it is a requirement of FAR 14.404-1. Had the defendant followed the procedures set out in the FAR, the government might have identified the applicable conversion requirements also set out in the FAR. Based on the Navy's failure to follow procedures, viewed in conjunction with the unauthorized conversion to a negotiated procurement, this court finds that the defendant acted improperly when it failed to comply with FAR 14.404-1. No reason has been identified as to why it is in the public's interest to condone the defendant's behavior in this case. Thus, the second EAJA requirement is satisfied because defendant was not substantially justified when it attempted to convert the solicitation from a sealed bid to a negotiated procurement and when it failed to follow the procedures required by the FAR for cancellations of IFBs.

C. Special Circumstances

The defendant contends that the third EAJA requirement absolves the defendant of any liability for EAJA fees and costs because equitable considerations exist that make an award to Brickwood unjust. First, defendant argues that Brickwood brought three bid protests in the Court of Federal Claims in 1999 that were dismissed, and that "[n]ot one of the protests has served an interest of justice or even accrued a benefit to Brickwood." In essence, the defendant appears to argue that Brickwood is filing frivolous suits that waste the court's time and unnecessarily delay government projects. Plaintiff, however, correctly points out that "Brickwood has appeared before this Court on *one* other matter separate from the [two] protests filed regarding the Patuxent River Naval Air Station." (emphasis in original). In addition, this court finds that the protest underlying the present EAJA claim was not frivolous or conducted in a frivolous manner and that the plaintiff was the prevailing party. Thus, the court rejects defendant's implication that plaintiff does not deserve an EAJA award due to special circumstances.

The defendant also argues that "the Navy converted to a negotiated procurement based in part out of fairness to Brickwood." The defendant implies that absent a conversion to an RFP, the plaintiff would have had no chance at being awarded the contract because the Navy would have evaluated only the base bids for award purposes. If the options bids were excluded from the evaluation, plaintiff would have been displaced as the low bidder. The defendant argues that the Navy gave the plaintiff another chance at the contract when the Navy attempted to procure through an RFP. However, canceling the first IFB and resoliciting another IFB also would have afforded plaintiff another chance at bidding for the contract, while placing the Navy in compliance with the FAR. Ultimately, defendant did cancel and resolicit using an IFB, which led to an award to plaintiff. Regardless of defendant's alleged motivations for attempting to convert to an RFP, the fact remains that the Navy's conversion to a negotiated procurement was not substantially justified under the FAR, and the plaintiff's first lawsuit was instrumental in forcing the Navy to conform. The court finds that defendant has not raised sufficient grounds for a ruling of special circumstances in defendant's favor.

D. Filing Requirements

Plaintiff has satisfied the filing requirements mandated under the fourth EAJA requirement. On July 22, 1999, the court dismissed the first protest and judgment was entered because the government had decided not to convert the solicitation to an RFP, but rather to cancel the solicitation and resolicit. Plaintiff filed its EAJA application with an itemized statement on August 23, 1999, within the thirty days allowed under 28 U.S.C. §2412(d)(1)(B). [FN11] Therefore, plaintiff has met the filing deadline. Plaintiff also has provided the supporting documents required for an EAJA claim. Defendant has not claimed otherwise.

> FN11.Starting the calculation on Thursday, July 22, 1999, the thirty days runs until Saturday, August 21, 1999. Rule 6(a) of the Rules of the United States Court of Federal Claims provides that "[t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, ... in which event

the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday." The deadline, therefore, for the filing of the plaintiff's EAJA claim was Monday, August 23, 1999.

III. Amount of Damages

Although defendant asserts that the amount of plaintiff's requested fees are unreasonable, the court finds that, in large part, plaintiff's itemized statement reflects reasonable amounts of time spent on tasks necessary to provide the plaintiff with effective representation and demonstrates time proportionate to the work product received by the court. The only request that is rejected by the court is reflected in a portion of the billing entry for July 22, 1999. In this entry, the plaintiff represents that an associate spent 2.10 hours performing the following tasks:

> Telephone conference with Paul Faver regarding Order dismissing Bid Protest Complaint. Review government's proposed dismissal order. Telephone conference with RMMoore regarding proposed order. Prepare changes and finalize dismissal order. Telephone conference with V. Kalos regarding New Complaint protesting cancellation of solicitation. Telephone conference with RMMoore regarding V. Kalos's suggested changes. Finalize new Complaint.

To the extent that a portion of the 2.10 hours was spent on tasks related to the preparation of the "New Complaint" filed with this court on July 23, 1999, this time is disallowed. The plaintiff has presented no evidence that the second protest of July 23, 1999 meets the four EAJA requirements, and fees to cover plaintiff's second bid protest were excluded in plaintiff's EAJA request currently under consideration by the court. With the exception of time spent on preparing the complaint for the second protest, the court finds that all time reflected in the plaintiff's application for attorneys' fees should be included in the calculation of the final award.

EAJA establishes a statutory cap of $125.00 per hour, but allows for adjustments above the statutory cap, if "the court determines that an increase in the cost of living ... justifies a higher fee." 28 U.S.C. §2142(d)(2)(A) (Supp. IV 1998). Plaintiff requests the court to award attorneys' fees reflective of "the increase in the cost of living from March 1996, the effective date of the EAJA statutory cap to June-August 1999, the dates the legal services were provided." Defendant has raised no objection to a cost of living increase. An increase in the rate of attorney's fees to account for cost of living adjustments (COLAs) may be awarded at the discretion of the court. *See Levernier Constr., Inc. v. United States*, 947 F.2d 497, 503 (Fed.Cir. 1991); *Oliveira v. United States*, 827 F.2d 735, 742 (Fed.Cir. 1987). The base date from which to begin the calculation of COLAs is the effective date of the statutory cap, March 29, 1996. *See California Marine Cleaning, Inc. v. United States*, 43 Fed.Cl. 724, 733-34 (1999)("Although the Federal Circuit and other circuits have advocated use of October 1981 as the appropriate baseline, the selection of that particular month was tied indivisibly to the October 1, 1981 effective date of the $75 statutory cap in effect at the commencement of the underlying litigation. The EAJA, however, was amended in 1996, raising the statutory cap to $125.... Consequently, March 1996 is the proper baseline for calculation of a COLA to the $125 cap.") (citations omitted). The end date for the calculation of COLAs is the date legal services were rendered. *Id.* (citing *Doty v. United States*, 71 F.3d 384, 387 (Fed.Cir. 1995)). A COLA award justifiably offsets the decrease in the value of the $125.00 rate due to inflation. This court joins the *California Marine Cleaning* court in declining "to impose a requirement that an applicant must do more than request such an adjustment and present a basis upon which the adjustment should be calculated." *Id.* at 733.

Although the court finds that a COLA award is justified, the plaintiff in the present case has not provided a complete calculation of the attorneys' fees owed. The plaintiff requests reimbursement for attorneys' fees incurred from June 16, 1999 through August 20, 1999. Because the cost of living increase, as measured by the Department of Labor's Consumer Price Index (CPI), is adjusted every month, fees billed in each month from June through August 1999 should be adjusted based on the CPI figure for each respective month. *See id.* at 734;

Gonzalez v. United States, 44 Fed.Cl. 764, 771 (1999). The plaintiff asserts that the appropriate rate for attorneys' fees, based on the CPI for July, 1999, is $133.83 per hour. The calculation of the rate for attorneys' fees appears to be incomplete. The plaintiff must provide the court with a calculation for attorneys' fees, adjusted for the COLA, which reflects the CPI figures for each month in which fees were incurred.

CONCLUSION

The court finds that the plaintiff has satisfied all four elements required to succeed on an EAJA claim. [FN12] Thus, the court finds the defendant liable to the plaintiff for EAJA fees and expenses. The court, hereby, **ORDERS** the parties to consult, and to file a joint status report on or before **Monday, April 30, 2001,** addressing the proper computation for an EAJA recovery, consistent with this opinion, taking into consideration the adjustment of the number of hours and the appropriate rate for attorneys' fees.

> FN12. Defendant argues that if plaintiff's EAJA application is granted, the judgment against the government should be offset by the "outstanding bill of costs for $2,426.25 pending in Brickwood's subsequent protest (Case No. 99-482C) ...." The proposed offset, however, relates to the second bid protest, while the EAJA application currently under consideration by the court relates only to the first bid protest. Therefore, defendant's request for an offset is denied.

IT IS SO ORDERED.

In the United States Court of Federal Claims

No. 99-388 C

BRICKWOOD CONTRACTORS, INC.,

JUDGEMENT

V.

THE UNITED STATES

Pursuant to the court's Order of May 1, 2001, it was held that plaintiff is entitled to receive attorneys' fees and expenses pursuant to 228 U.S.C. sec.2412(d).

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff is awarded attorneys' fees and expenses in the sum of $10,939.09 with said sum to be paid by the subject agency as provided for in 28 U.S.C. §2412(d).

Margaret M. Earnest
Clerk of Court

May 1, 2001 **By:** /s/
Deputy Clerk

NOTE:
As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filling fee is $105.00.

In the United States Court of Federal Claims

BRICKWOOD CONTRACTORS, INC.,

Plaintiff,

V.

No. 99-388C
Filed: May 1, 2001

UNITED STATES,

Defendant.

ORDER

The court is in receipt of the parties' April 27, 2001 joint status report, which provides for payment in the amount of $10,819.09 to the plaintiff for attorneys' fees to which the plaintiff is entitled under Equal Access to Justice Act (EAJA). The stipulated amount reflects an appropriate deduction in the number of hours claimed and a complete calculation of the attorneys' fees owed, modified for the monthly cost of living adjustment. In addition to the $120.00 filling fee to which the plaintiff is also entitled under the EAJA, the total amount of damages owed to the plaintiff is $10,939.09. The Clerk's Office is directed to enter judgment for the plaintiff in accordance with the court's opinion of April 9, 2001, which found the defendant liable to the plaintiff for EAJA fees and expenses, and in accordance with this order, in the amount of $10,939.09.

IT IS SO ORDERED.

/s/

MARIAN BLANK HORN
Judge

UNITED STATES
COURT OF FEDERAL CLAIMS

BRICKWOOD CONTRACTORS, INC., Plaintiff,	)	
v.	)	No. 99-388C
THE UNITED STATES, Defendant.	)	

Pages: 1 through 32

Place: Washington, D.C.

Date: June 21, 1999

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BRICKWOOD CONTRACTORS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99-388C
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

Courtroom 7, Room 508
National Courts Building
717 Madison Place, N.W.
Washington, D.C. 20005

Monday,
June 21, 1999

The parties met, pursuant to the notice of the Court, at 11:45 a.m.

BEFORE: HONORABLE MARIAN BLANK HORN
Judge

APPEARANCES:

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LE COPY

PROCEEDINGS

(11:45 a.m.)

THE CLERK: All rise. The United States Court of Federal Claims is now in session, the Honorable Marian Blank Horn presiding.

THE COURT: Be seated. The case on the docket is Brickwood Contractors Incorporated against the United States, Case No. 99-388C. This is the first conference on the TRO that was filed Friday afternoon, and what I had hoped is that we would get together to see where we are.

Note, before you enter your appearances for the record, that the complaint is pretty bare. And so part of the problem for us in preparing for this, and I am sure also for the Defendant, is that it gave us very, very little notice of what was going on in the case. So, if you ever do this again, sir, give us a little more to work with. This is, this is really bare bones.

All right. Let's have notices of appearance for Plaintiff and the Defendant and also indicate, if you would please, anyone that you have brought with you here today.

Plaintiff?

MR. TANSEY: James Tansey for the Plaintiff.

THE COURT: Defendant?

MR. FAVER: I am Paul Faver on behalf of the United States. Here with me today we have Cynthia Guill,

who is the counsel for the Navy's Engineering Field Activity, Chesapeake; also, Chad Miller, who is the assistant counsel. We also are fortunate to have, even with the short notice and the failure to receive the General Order 38 precept notice, Alyson Harbage, who is the contracting officer, as well as Rhonda Chaney, who is the contract specialist, Your Honor.

THE COURT: Very good. Thank you.

Well, TROs always are a little difficult to get ready for and for some reason they are always filed on Friday afternoon, which is also, it seems to me, a little bit unfair on behalf of the Plaintiffs in a way, although it is certainly not against the rules. But they seem always to work out that way. I appreciate your ability and willingness to hustle and get together as much information as you can.

This isn't, to my mind -- and maybe I'm missing something -- but let me outline where we have gotten over the weekend as well and see if I have been able to at least isolate the primary issue that I think we have in the case. And it really is, I think, a single-issue case essentially which has some factual nuances, as all of these do. But in terms of what are we here to be talking about, it is very simply whether the amendment that was issued by the Navy was justifiable on the basis of the FAR, and particularly

Section 14.404-1, which gives you the rules and the ten instances in which you can potentially do something like what appears to have been done based on, as I say, the very bare-bones complaint that was filed.

DFAR that is at 214.404-1 does appear to authorize down and delegate the ability to make the findings if we go with items either six, seven or eight on the list in the FAR. So, it's a very, very simple, very straightforward. There is not very much case law out there. What case law there is out there is fact specific, and the most recent case by Judge Bruggink that we certainly read and a couple of other cases, seem to make decisions based on the facts that were present in those particular cases. And in the Bruggink case, of course, it was based primarily on the equities of the situation in that the bid was apparently lost by the procuring agency and appears to have been timely filed.

So, what we are dealing with would be very fact-specific assessment of whether the Navy acted arbitrarily and capriciously in making the change that they made. When we looked at the documents that we were given, which, again, were very, very bare bones amendment, it looks to me like there were a few minor requirements that were changed, particularly with respect to PCBs, and then a few deletions and maybe possibly additions -- but it was hard to tell from

the documents I had of particular contract clauses -- but mostly deletions and mostly what appear to be relatively insignificant. So, I would say right up front, if that is the basis of the claim, that this was not arbitrary and capricious because there were changes made, that would not fly for very long.

So, what I'm wanting to hear here this morning is essentially, what is the basis for the Navy's action, because ultimately, it seems to me, it is a one-issue case and it is going to be up to me to decide whether or not the decision and the procedures invoked in making that change were arbitrary and capricious or not. It's just not real complicated as I see it. As I say, maybe I'm missing something because the package I had was extremely succinct, to use a kinder word than I used over the weekend as we were trying to make some sense of this.

But at the same time, the issue appeared equally succinct and in the package that I had, I found no basis for the change that was made, so that if I get nothing further in terms of information, I will make a finding of arbitrary and capricious.

So, we have a little bit of a problem on both sides here. One side didn't give us enough information and the other side doesn't appear to have justification for its behavior. So, obviously, this is a bare-bones record and

those are very conclusory and very preliminary thoughts, but it should be enough for you to work from, from this point forward.

So, let's start with you, Mr. Faver. What was the basis, as you understand it, and what documents do I look at to determine that, indeed, as I suspect you are going to tell me, this was not an arbitrary and capricious act on the part of your client?

MR. FAVER: That's correct, Your Honor. May I speak from here or --

THE COURT: You may. You certainly can.

MR. FAVER: Briefly, and I wish to just mention that I was fortunate to round up these certain people from the Agency. Unfortunately, despite our efforts over the weekend we were unable to convene until earlier this morning, which was the first time I was able to learn a little more about the types of issues that you are raising with the parties this morning, Judge, particularly why we did what we did.

THE COURT: Well, you know, I'd like to comment right now. This is a TRO. It is also a preliminary injunction request -- and a permanent injunction request, obviously. And none of us likes getting these things on Friday afternoon. I can definitely promise you that my staff members who were here this weekend, and I, who spent

some time on my computer at home doing some research -- but working on some other matters as well -- didn't enjoy it either. So, I'm not real sympathetic to the fact that you couldn't get together over the weekend. Nobody likes to ruin their weekend, but it happens, and if the Plaintiff chose to put you in that position, you needed to respond. So, you're not going to get a lot of sympathy from me on that.

MR. FAVER: Perhaps I misspoke. What I had intended to say is we were unable to locate anybody until --

THE COURT: It's amazing how they disappear.

MR. FAVER: But we fortunately were able to talk, and in direct response to your question, Judge, I did, like you, work over the weekend, but without the benefit of the factual background of what occurred specifically. What had happened was there were options along with the original I.F.B.

THE COURT: Let me just stop you for a minute. Are you picking them up okay?

COURT REPORTER: Yeah, it's okay.

THE COURT: Okay. Okay, go ahead.

MR. FAVER: Sorry. And those options were in large part connected with some testing -- PCB-testing requirements in the initial I.F.B. As a result, some confusion had occurred. The contracting officer, in the

light, decided, well, we'd better go out and just test it ourselves and make this determination whether or not there's PCB paint that needs to be removed and disposed of and then remove all of that confusion, remove the particular testing requirements which, Judge, although it may not be readily apparent from the papers that are attached to the complaint that you and I have had a chance to review, could be a very significant sum of money that constitutes this particular solicitation.

THE COURT: Sum of money in reducing the price or --

THE FAVER: In reducing the price. The testing component, the PCB-testing component, could be a material part of this solicitation. And the fair thing to do, the right thing to do, is say, hey, you know, let's delete this requirement and let the people who participate in the I.F.B. now -- , absent this requirement.

THE COURT: Why would you switch it then during negotiated procurement as to another closed -- if you eliminate something, it seems to me you could also -- and I'm just asking, I'm throwing it out -- if you eliminate a requirement, why couldn't you have simply eliminated that cost component and still remained with the lowest bidder -- or would that have changed the result, or in the alternative -- rather than go to a negotiated procurement,

which is suspicious right off the bat in some ways. Why could you have not gone to another sealed procurement? Essentially everybody has their stuff. You could do it pretty quickly. Why did you make the choice you did to go to a negotiated procurement?

MR. FAVER: Well, there were a few earlier questions you asked, too, that I was thinking about and trying to explain to you as well. But --

THE COURT: In responding, look at this list that we've got in the rule. It's pretty clear. And where do you fit doing what you did is the real question. Because if you look at the list: Inadequate or Ambiguous Specifications -- it's not really so much inadequate, it's changed --

MR. FAVER: It would be more "specific" justification than "revised."

THE COURT: Right. But they're not really revised in any -- what -- do you know what would happen, would have happened, if you had simply eliminated that cost component --

MR. FAVER: Well --

THE COURT: -- or reduced it? I gather there's some PCB work still left to be done. Is that correct or not?

MR. FAVER: No, there's no --

THE COURT: So, it gets eliminated. So it would

be easy. Okay. So it would be easy. You don't eliminate it. Okay, if you eliminated that -- why did you go to a negotiated procurement? It's just a strange choice. I've been hearing procurement for a very long time, so -- there are many things in this Court that I'm not an expert on, and that may be one I'm close.

MR. FAVER: I'm not too sure that that could have been easily done and reached the same and fair result that the negotiated procurement may result in. The bids have been opened, they have been reviewed by the -- presumably by the other bidders.

THE COURT: Well, the -- clearly the fairest is, cancel it, go back, do another sealed. That's the easiest answer.

MR. FAVER: But perhaps not the most efficient under the given circumstances, which is why the FAR provides for this option, an alternative for converting to the RFP --

THE COURT: But it provides for the alternative with a very strong presumption that it's a rarity not to be gone to without good justification. And at least in this record so far, there is no justification. But granted, so far the record has been compiled by the Plaintiff. So, tell me what it is -- what document -- is there a contemporaneous document to when this occurred?

MR. FAVER: Not that I know of yet, Judge, I'm

sorry.

THE COURT: You did ask that question, I am sure.

MR. FAVER: I'm not too sure. We were trying to really learn of the factual background and just find out who did what when and the like. But to my knowledge there is -- when you say contemporaneous, meaning --

THE COURT: Justification, written justification.

MR. FAVER: For the decision to --

THE COURT: To go to a negotiated procurement and issue that amendment. You know, that's pretty bald, too. In other words, it doesn't say why. It just says, here's how we're doing it.

MR. FAVER: I know there's a lot of writings I haven't had a chance to receive or review. Whether or not any of those particular writings address that particular issue, I do not know as yet.

THE COURT: Okay.

Let me turn to the Plaintiff for a minute.

MR. TANSEY: Yes, Your Honor.

THE COURT: You have asked for a temporary restraining order and all of the things that follow. Tell me about your request for a TRO here and what you perceive the timing to be.

MR. TANSEY: In terms of the timing, counsel -- we discussed it this morning.

THE COURT: Well, I'll give you an opportunity to talk to each other since I assume that you had not probably talked to each other over the weekend.

MR. TANSEY: Well, we talked -- I mean, just basically background. After we filed this on Friday, we did talk. Counsel informed me, one, that he was unable to -- or he was attempting at that point to get in touch with his witnesses. My call to him basically was to find out what was the reason for the action. This morning we talked in terms of --

THE COURT: Once you got to the courtroom?

MR. TANSEY: I'm sorry.

THE COURT: Once you got to the courtroom.

MR. TANSEY: Well, prior to being in the courtroom this morning. We had agreed that we would again talk prior to appearing here today, because presumably counsel at that point would have had a tough opportunity to talk to representatives. So, we talked, and I think in essence the way we left it, subject to the Court, was that the request for proposal submissions which were by the amendment due on the 24th of June would be postponed by the Navy until July 1; that in the interim both --

THE COURT: All right. Now, I'm not sure I'm following you. The new bids are due on June 24th as I understand them. And what you are saying to me is that the

Navy has agreed to not open them till July 1 -- is that what you are saying?

MR. TANSEY: I believe the Navy --

THE COURT: Well, why don't we hear from the Navy?

MR. FAVER: Judge, what we had actually discussed in an attempt to resolve the most immediate issues that were before the Court and that needed immediate addressing was the 24th deadline, which is the time when we would receive the proposals under the RFP. And what we agreed to do and what we discussed, of course with Your Honor's approval --

THE COURT: Under Amendment 5?

MR. FAVER: Correct. What we agreed to do was to postpone that by one week, until July 1st, and give us that one week to get together, exchange the information and facts necessary for both of us to decide where we need to go -- for the opposing side to discuss his position with his client, which may well result in a withdrawal of this complaint, Your Honor, and the solicitation proceeding as is. In all likelihood, I think, when we really engage in those serious discussions and have a chance to meet with our respective clients and then meet collectively as well, that will be the case.

THE COURT: How many offerors are in this pool?

MR. TANSEY: Six, I believe.

MR. FAVER: Five, I'm sorry, Judge, five.

THE COURT: Are all or any of them aware of this morning's proceedings?

MR. FAVER: Not that I know of, unless the opposing counsel had informed them.

MR. TANSEY: To my knowledge -- I certainly made no one aware -- no other bidder aware, and to my knowledge, my client has not as well.

MR. FAVER: I was glad to make my client aware.

THE COURT: And why do you think it would resolve it?

MR. FAVER: I think when we roll up our sleeves like -- you know, my folks came over as early as they could, then we almost immediately came over to meet with the other side. I think when we roll up our sleeves and start talking more about it, I think this is a good chance, that they may just decide that, you know, they still have a chance of getting the contract award in the RFP, that what we did was prudent and fair and reasonable under the circumstances, and that this case ought to be withdrawn and allow the solicitation to proceed. That may well be the likely result.

THE COURT: Let's not let anybody speak for you or your client. Do you agree with that assessment?

MR. TANSEY: I agree that one way or the other

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we'll try to resolve it. My two issues with respect to where we go from here, you might say, were, one, to determine what was the compelling reason that the Navy so acted. Because when I looked at the solicitation originally, it wasn't clear to -- well, it was not clear to me whether the Navy just thought, regardless of a compelling reason, it had the authority per the FAR, as it cited to, or whether in fact it was alleging that within the amendment there was a compelling reason. So I didn't know specifically why the Navy thought this action was justified. This morning we had preliminary discussions as to what the justification on behalf of the Navy is. I have two things basically to do: one, to talk to my client as to the significance of the deletion of the PCB testing; and secondly, really now knowing that that is the basis for the Navy's action, to further take a look at some of the case law that decides whether or not we believe that that is justification.

THE COURT: Well, you are going to find very little case law, because we've done a pretty careful look. In fact, we've done two separate ones. One this morning again and one over the weekend. There isn't much.

This is truly a discretionary decision and it is truly, in my opinion, a fact-specific one. I don't have a record, obviously, at this point as to the extensiveness of

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the deletion and how that impacts the solicitation as a whole, because we don't even have the solicitation as a whole. So, I can't tell.

Mr. Faver, is it in fact accurate for Plaintiff to describe your basis as wholly the PCB issue --

MR. FAVER: Yes, Your Honor.

THE COURT: -- or is there something else? So the missing or added -- I didn't know that there were too many added but there are some missing -- the missing FAR clauses that were deleted, that's not the basis?

MR. FAVER: No, Your Honor.

THE COURT: That's just mechanical and basically not important?

MR. TANSEY: Here's to the other side of the room -- I think I will be able to state categorically and unconditionally, Judge, that it's the PCB testing that's at issue exclusively.

THE COURT: All right. So, we are dealing just this issue.

MR. TANSEY: That's correct, Judge.

THE COURT: So, it's a real simple case then. I don't think the Plaintiff is going to find any case law that's going to help him out. The Bruggink case is a hazardous waste case as well but it goes off so much on the fact that they simply left the bid in the bin, it looks

like --

MR. TANSEY: I'll be paranoid until they brief me on that case.

THE COURT: -- and that this particular individual had left some other bids in bins and that there was perhaps a persistent issue here, so that that's a very -- you know, that doesn't really get us anywhere. The question we are going to have to face, then, is whether, you know, that is enough of a reason or were there better ways that were less prejudicial to resolving this issue. And it's really going to be judgmental. I don't know.

All right. If you go the extra week, what is -- what does that buy us other than taking a TRO off the table? What do we really -- I mean, do we really want --

MR. FAVER: I don't even like that whole notion in itself.

THE COURT: Well, given my own schedule, I'd probably rather decide the TRO this week because I'm leaving town to go to California and Denver on three cases, so that, you know, that's the question. If this is going to be resolved, let's resolve it. I have no particular need to buy time just for the sake of buying time. And my question, therefore, is, you know, if all you are doing is kicking it down the turnpike so to speak, that doesn't really get us anywhere.

MR. FAVER: The intention I had both when I came to this courthouse to talk with the opposing counsel and then entering in your courtroom was to actually try to accomplish two things over the next week period and the seven-day extension that we've agreed to under the circumstances. And that is, try to resolve it amicably, see if there is some alternative or one party convinces the other that they ought to change their position. Alternatively, Judge, too, call your chamber at the conclusion of that week and coordinate with your assistant to come up with a briefing schedule so that we can, in coordination with your calendar, get this case resolved.

THE COURT: I've got this week that I can spend on it and then I am probably going to be in serious trouble for the month of July. And so that's the problem. That is really the issue, and if that means we are going to kick it into July, that's not good for me.

THE FAVER: The reality is, though, Judge, I believe -- and everybody please correct me if I'm wrong -- is that if we cannot reach an amicable resolution or somehow resolve this matter by next Friday -- or Thursday, excuse me -- next Thursday, July 1st, and we come up with a briefing schedule which would include providing the Court with the administrative record, the opposing side, and cross-motions for summary judgment and the like, I'm not too sure we will

have anything for Your Honor to attend to until that point.

THE COURT: Okay. You are, by saying that, you are committing on behalf of your Agency to essentially the following: that they do not need this contract during the month of July, because if you are -- and it is not even only my schedule -- if what you are talking about is a briefing schedule in getting the record filed, whatever, you are talking a couple of weeks yourself. And you know, you've got to give me at least a week or something to decide it. So, you are essentially saying to me, this is not an urgent contract.

MR. FAVER: Well, what I'm saying is, over the next week another issue that is going to dictate a lot of this is, what type of urgency are we dealing with?

THE COURT: Oh, but I need to know that today. That's the one thing I need to know today because if it is urgent, then I'm not kicking it down the line at all and we are going to resolve this thing by the end of this week. And I'm prepared to do that.

MR. FAVER: No, I understand. I am confident that even if urgency is required, that we will not need Your Honor to hear the fully briefed motions until Your Honor is back and available, which we understand will be the end of July or beyond.

THE COURT: Okay. Because I will be in and out of

town for certainly the beginning part of -- well, certainly through the first couple -- well, let me just look at this for a minute. The first incomplete week of July, the first full week of July, the second full week of July -- those are not good weeks for me, given my schedule. I have a trial scheduled during the week of the 19th of July, so we're into the end of July. I will be out of town probably a couple -- the first week in August. You are being kicked into the middle of August, is what you are doing.

So, understand that, because otherwise I'm more than happy to decide this thing this week. And that is something I can easily do. It's an easy case. There's very little relevant law. I mean, there is one reg, one DFAR, and a whole lot of discretion. I can do that easily. I'm paid to make decisions and I don't mind making them. So, you know, I'd much rather do it this week than subsequently. This Plaintiff has asked for a TRO.

MR. FAVER: Uh-huh.

THE COURT: I'm willing to hear it as a TRO.

MR. TANSEY: Your Honor, counsel and I did discuss and we did agree to this, you might say, briefing schedule. And since we don't have an opportunity to, you might take the hook.

THE COURT: You have every opportunity to confer, because I'll give it to you right now if you want it.

MR. FAVER: Well, I'll just toss it out. In light of, in light of the fact that you say -- and I'm sure you are correct -- that there's minimal case law.

THE COURT: There's very little. I'd love for somebody to find me some, frankly, and we have looked, as I said, twice. I have one lawyer who works for me -- he's got about fifteen years of experience, about probably eight or nine of them in government contracts -- who has been working all weekend. Another lawyer looked at it this morning. I looked at it over the weekend -- very quickly, I will add, because I was working on a 130-page opinion in another case, way too long, way too verbose, but that's what it is -- and you know, I don't see it.

MR. TANSEY: If that is -- given that's the case, and given we're solely talking about --

THE COURT: Did you find anything, Mr. Faver? You looked too.

MR. FAVER: Your Honor, I did. And let me also say this --

THE COURT: You did look and you didn't find --

MR. FAVER: I did not find anything further than --

THE COURT: And you did look.

MR. FAVER: That's correct, Your Honor.

THE COURT: And you have not looked yet?

MR. TANSEY: I looked in general, in terms of what authority, but not as to the specific.

THE COURT: Well, that in and of itself is pretty interesting, but that's all right.

MR. FAVER: Judge, just to give an idea, though, how really, I think the parties need this week to sort of sort this thing out, it's a good chance that, if we did not remain with the RFP and stuck with the existing solicitation, the I.F.B., that my opposing counsel's client is not the low bidder, despite what he may believe or they may believe, and so --

THE COURT: If you know, tell me how that works if you eliminate the PCB requirement. Then we're obviously not going to let them pay for something they don't need.

MR. FAVER: Well, I guess, I guess what I'm suggesting is that there are possibilities that once this thing -- once all the different options are looked at, that one option they actually may be seeking from this Court actually is to their detriment. They may -- if they are not, in fact, the lowest bidder --

THE COURT: With the PCB requirement?

MR. FAVER: That's correct.

THE COURT: Okay. All right.

Well, I mean, it does sound like if you can resolve it in a week, it's better to resolve it than to spin

a lot of wheels. But I want you to understand then that your client is essentially saying they can live without this contract for a period of time, and I want to be sure that you are making that statement knowingly and they are comfortable and they are not jumping out of their seat. So, do you want a minute to talk to them?

MR. TANSEY: Well, if you wouldn't mind, Your Honor?

THE COURT: I think that would be an excellent idea. You can step out. If you'd rather do it outside, that's fine.

(Whereupon, at 12:08 p.m., Mr. Tansey and his client stepped out of the courtroom to confer. They returned at 2:21 p.m.)

THE COURT: So, where are we? How critical is this to your client? How much slop-over time do they really have?

MR. FAVER: Judge, every procurement is critical, as Your Honor well knows.

THE COURT: Some are more critical than others, as I well know too.

MR. FAVER: We understand that Your Honor hesitates to settle and resolve this week, that she may not be able to impose -- .

THE COURT: Well, let's use the term "resolve" advisedly here because some of it is going to be a question of whether the administrative record is any good. My last couple of administrative records have not been, and we have actually got what may turn out to be the longest living TRO known to man, unfortunately, and the basis for that is because there is so much fighting, as it happens, between the Navy and the Plaintiff on the contents of the administrative record. And -- I mean, it's absurd, it's gotten to the point of being totally absurd. I'm not suggesting one side or the other is more absurd than the other but they are both absurd. And so, you know, the problem we've got is in the haggling over the administrative record. That kicks everything down the road. I can't imagine that would happen here because it is such a simple case. But you know, what we're looking at is -- who knows.

Tell me what schedule you all were thinking of when you quote unquote reached your original agreement as to time and date.

MR. FAVER: The only date that was specifically discussed and agreed to would be that we would not open --

THE COURT: All right. So you would open on July 1st?

MR. FAVER: Yeah, we would not receive or accept the proposals until July 1st.

THE COURT: Okay. Receive July 1st. You know that when you do that you are going to get a lot of other of the four or five, depending upon whether you have five or six other contractors -- we've heard both numbers this morning.

MR. FAVER: I misspoke. It was five.

THE COURT: Pardon?

MR. FAVER: I misspoke. It was five.

THE COURT: It is five for a total of six.

MR. FAVER: No, a total of five.

THE COURT: A total of five, so it's four others.

MR. FAVER: That's correct, Your Honor.

THE COURT: All right. You'll get lots of inquiries there. Then we may start to multiply our potential participants in this adventure here.

All right. So, you would receive the bids pursuant to the amendment.

MR. FAVER: Right. And then, if despite that change, Your Honor, we did not have this thing resolved and the case withdrawn and off your docket, then we would propose a schedule to accommodate Your Honor's schedule.

THE COURT: Well, tell me what you are thinking of. How long would it take you to put an administrative record together in this case?

MR. FAVER: We think that we could have the record

together within ten days thereafter, Judge, which would be --

THE COURT: July 12th.

MR. FAVER: July 12th, correct.

THE COURT: All right. Let's assume -- all right, and then briefing.

MR. FAVER: I believe that the Plaintiff had mentioned that he could have his --

MR. COURT: He can talk for himself. How long would it take you?

MR. TANSEY: If I have the brief on the -- I'm sorry, if I had the ad record by the 12th, I'd have the brief into the Court by the 19th.

THE COURT: All right. And what time do you need?

MR. FAVER: What I had mentioned was two weeks thereafter we'd have our cross-motion for summary judgment --

THE COURT: So, that would be --

MR. FAVER: -- in opposition.

THE COURT: -- that would be August 2nd? That's two weeks. Okay. Well, you have probably taken it out of my problem range by doing that. And reply brief for the Plaintiff August 9, or do you need more than that?

MR. TANSEY: I don't need more than that, it just comes into the vacation schedule.

THE COURT: Well, it's up to you.

MR. TANSEY: I understand what you are saying. What's the chance that the government getting its brief --

THE COURT: No, they are going to do a cross-motion for summary judgment, so --

MR. FAVER: That's correct, Judge.

THE COURT: -- so that's two weeks. It's not unreasonable. So, either August 9th, or we kick it down the road with the agreement of the Defendant to the 16th and you take two weeks. I don't care, but it's a question again now of the time the government has to award this contract.

MR. FAVER: And this is why -- all right. Leave it at the 9th.

THE COURT: All right. August 9th? All right, then, we will set oral argument --

MR. FAVER: Judge, that would be not a reply, that would be an opposition to our cross-motion. Then we would have a chance to file our reply.

THE COURT: File a reply. Okay.

MR. FAVER: And we'd file that within five days.

THE COURT: All right. So, that would be, reply would be August 16. The opposition would also be -- but that would be a one back-shot, so the reply would be August 16th. And we'll set an oral argument.

Now, the problem I'm going to have here is there

is going to be a period in there where -- I'm not going to be available at the end of August. Again, I'm here the beginning of August, so you're hitting me -- and it's going to be a couple of days; it's not going to be real long but --

THE FAVER: If you told us, Judge, when you would like to --

THE COURT: I don't know the answer. You're hitting me in August. I'm going to be driving a U-Haul, so --

MR. FAVER: Right. What I was thinking, just trying to work backwards from your schedule --

THE COURT: I don't know the answer to that because I first have to find out where it's going. Let's tentatively -- and this is tentative and you are going to have to stand available for me during these weeks for an oral argument -- but we'll tentatively schedule it for the 18th of August. Well, no, the 19th of August. The 18th of August. Now, that means that your reply -- Mr. Faver, you are going to have to get us a courtesy copy.

MR. FAVER: Absolutely, Your Honor.

THE COURT: All right.

MR. TANSEY: I'm sorry, Your Honor, 18th or 19th?

THE COURT: Eighteenth.

MR. TANSEY: Thank you.

THE COURT: Ten a.m.

MR. TANSEY: And I'll keep it very brief, Judge.

THE COURT: Hopefully by that point there won't be much left. This is not hard. That's what very clear about this. This is very, very easy. It shouldn't even take that long. But if, and I guess the answer is, if you find that you can get your cross-motion for summary judgment in sooner, then we'll adjust the days. So, we'll take it as soon as you can and try to move that up further.

MR. TANSEY: That sounds good, Judge.

THE COURT: It is way too long for this kind of thing. We should be able to do it this week, frankly.

MR. FAVER: Well, let's hope we'll announce it.

THE COURT: Pardon?

MR. FAVER: Let's hope we will have a positive announcement, then we're requiring a --

THE COURT: All right. Well, we'll do that then. That will be the schedule.

Any other questions today? Mr. Tansey?

MR. TANSEY: No, Your Honor.

THE COURT: Mr. Faver?

MR. FAVER: No, Your Honor. Thank you.

THE COURT: And Mr. Faver, let me thank you. Obviously, we have different kinds of experiences with lawyers from the Justice Department on TROs and I really

appreciate the intensity and the dedication with which you made yourself available to the TRO. You did exactly what you should be doing. I wish I could say this to everybody. The Navy should consider itself lucky to have you on the case.

MR. FAVER: Thank you, Judge.

THE COURT: Thank you. Good morning.

THE CLERK. All rise. Hearing is adjourned.

(Whereupon, at 12:30 p.m., the hearing in the above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: 99-388C

CASE TITLE: Brickwood Contractors, Inc. v. United States

HEARING DATE: June 21, 1999

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Court of Federal Claims.

Date: June 25,1999

Elaine Kim

Official Reporter

Heritage Reporting Corporation

Suite 600

1220 L Street, N. W.

Washington, D. C. 20005-4018

28 U.S.C. Sec. 2412. - Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the

basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is

unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection -

(A) ''fees and other expenses'' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that

(i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and

(ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) ''party'' means

(i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or

(ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section

501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) ''United States'' includes any agency and any official of the United States acting in his or her official capacity;

(D) ''position of the United States'' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) ''civil action brought by or against the United States'' includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) ''court'' includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) ''final judgment'' means a judgment that is final and not appealable, and includes an order of settlement;

(H) ''prevailing party'', in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) ''demand'' means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty

(i) in the complaint, or

(ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BRICKWOOD CONTRACTORS, INC.,

Plaintiff,

V. **No. 99-388C**
(Judge Horn)

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rules 12 (b) (1) and 12 (h) (3), Rules of the Untied States Court of Federal Claims, the defendant respectfully requests an order dismissing this action for lack of subject matter jurisdiction. The plaintiff commenced this case seeking to challenge a decision by the Department of Navy to convert Solicitation No. N62477-97-R-0083, Repair Elevated Water Storage Tanks, Naval Air Station, Patuxent River, Maryland, from an Invitation for Bids (IFB) to a negotiated procurement pursuant to FAR 14.404-1 (f).

At the hearing on the plaintiff's motion for a temporary restraining order, the Court seriously questioned the decision to convert to a negotiated procurement and suggested that canceling the solicitation and re-soliciting using another sealed bid is the fairest and easiest way to proceed. After further consideration of both circumstances surrounding the solicitation and governing FAR provisions, and in light

of the Court's comments at the TRO hearing, the Navy has canceled the solicitation and plans to re-solicit using a new IFB. Attached is a copy of the amendment canceling the solicitation. Because the cancellation renders the plaintiff's claim moot, the Court lacks jurisdiction and should dismiss this action.

WHEREFORE, the defendant respectfully requests an order dismissing this action for lack of subject matter jurisdiction.

Respectfully submitted,
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DAVID M. COHEN
Director

/s/

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July 16, 1999

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